Nov. 5th 1872 21-178 Filed

Filed

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~327~~ 654

GEORGE S. MARSH, APPELLANT,

vs.

NATHANIEL M. WHITMORE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

FILED DECEMBER 5, 1872.

Dec. 1872.

SUPREME COURT OF THE UNITED STATES.

No. 327.

GEORGE S. MARSH, APPELLANT,

vs.

NATHANIEL M. WHITMORE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

INDEX.

	Original.	Print.
Bill of complaint	3	1
Interrogatories to defendant	10	4
Process to and appearance of defendant	12	5
Answers of defendant	12	6
Defendant's special answers to interrogatories	19	9
Plaintiff's demand of account, marked A	22	11
Defendant's account, marked B	22	11
Agreement as to parties to suit	23	11
General replication	24	12
Interrogatories to plaintiff	25	12
Cross-interrogatories to plaintiff	26	13
Plaintiff's answer to interrogatories	27	13
Plaintiff's answer to cross-interrogatories	28	14
Plantiff's Exhibit A, second mortgage	29	15
Plaintiff's Exhibit B, receipts of the railroad	32	16
Plaintiff's Exhibit C, total amount of sinking fund	33	16
Plaintiff's Exhibit D, letter, Whitmore to Marsh, March 20, 1856	33	16
Plaintiff's Exhibit E, defendant's account marked B, (See p. 22)	33	17
Plaintiff's Exhibit F, outside address of letter, Whitmore and Paine to Marsh	34	17
EVIDENCE OF RESPONDENT.		
Deposition of J. W. Bradbury	34	17
(A) copy of note of railroad, annexed	38	19
Deposition of Darius Alden	38	19
"A," present condition of the sinking fund	41	20
Schedule E, comparative statements receipts of railroad	43	22
Defendant's Exhibit No. 1, deposit of bonds	44	22
Defendant's Exhibit No. 2, notes, Marsh to Whitmore	45	23
Defendant's Exhibit No. 3, note, Marsh to Danforth	46	23
Defendant's Exhibit No. 4, execution Wadley *v.* Marsh	46	23

	Original.	Print.
Defendant's Exhibit No. 5, letter, Whitmore and Paine to Marsh, Aug. 27, 1856	46	24
Defendant's Exhibit No. 6, letter, Marsh to Whitmore, Sept. 25	47	24
Defendant's Exhibit No. 7, letter, Marsh to Whitmore, June 30	48	24
Defendant's Exhibit No. 8, letter, Whitmore to Marsh, March 20, 1857	48	25
Defendant's Exhibit No. 9, letter, Marsh to Whitmore, June 6, 1857	49	25
Final decree	51	26
Appeal bond	51	26
Clerk's certificate	54	27
Citation	55	27

1 MAINE DISTRICT, *first circuit.*

Circuit court U. S., September term, A. D. 1870.

GEORGE S. MARSH, APPELLANT,
vs.
NATHANIEL M. WHITMORE. } In equity.

2 MAINE DISTRICT, *ss*:

At a term of the circuit court of the United States, for the first circuit, begun and holden at Portland, within and for the district of Maine, on the twenty-third day of September, in the year of our Lord one thousand eight hundred and seventy-one.

Present, the honorable Edward Fox, district judge.

3 GEORGE S. MARSH
vs.
NATHANIEL M. WHITMORE. } Con. 18.—In equity.

On the 12 day of March, A. D. 1869, A. G. Stinchfield, solicitor, filed the following bill of complaint, viz:

To the honorable the justices of the circuit court of the United States within and for the district of Maine:

1. George S. Marsh, of Anne Arundel County, State of Maryland, and a citizen of said State of Maryland, brings this bill of complaint against Nathaniel M. Whitmore, of Gardiner, in the county of Kennebec, and State of Maine, and a citizen of said State of Maine. And thereupon your orator complains and shows unto your honors that in year 1855 or thereabouts he was the holder and owner of coupon-bonds of the Kennebec & Portland Railroad Company, a corporation duly organized under the laws of said State of Maine, issued on the fifteenth day of October, 1852, to the amount of and the full value of sixty-five hundred dollars, upon which interest was payable at the rate of three per cent. semi-annually from the several dates thereof, fully secured by a mortgage of said railroad, duly executed and recorded; that he was the holder and owner of two negotiable notes made and signed by the treasurer of said company, by due authority; one dated October 30, 1854, for one thousand dollars, payable in nine months from date to the order of said treasurer, and by him endorsed, and one dated December 30, 1854, made, signed, and endorsed as aforesaid, payable in twelve months from date.

4 2. And your orator further shows unto your honors that in the year 1855 or thereabouts, being indebted to certain persons in the State of Maine, and having occasion to employ counsel in and about the premises, he duly retained the said Whitmore, he being a counsellor at law, as his counsel, attorney, and agent, upon the representation of the said Whitmore that he could and would adjust and compromise with the creditors of your orator upon terms favorable to your orator, and would, if necessary, advance to your orator or on his account, money for that purpose, if your orator would deliver and entrust to him said coupon-bonds and notes, the said Whitmore assuring your orator that he wished to derive no advantage therefrom, except a fair return for all money advanced to your orator, or on his account, and a fair and reasonable compensation for his service in the premises; and your orator reposing confidence as he did in the representations of said Whitmore as his

counsel, attorney, and agent as aforesaid, and in whose advice and supposed good faith he reposed great confidence, at the special instance and request of said Whitmore, he delivered and entrusted to him said bonds and notes to the amount and full value of eighty-five hundreddollars, and the said Whitmore received the same upon the trust aforesaid, and faithfully agreed with your orator not to sell or dispose of said securities without your orator's consent, and not to claim or demand thereof more than was fair and sufficient to fully indemnify him for his said advances and services, not to exceed the fair amount and just value of the same, and to fairly and justly account to your orator on demand for said securities, and, when so indemnified, to return to your orator on demand so much and such parts thereof as were not necessary to indemnify him as aforesaid, and to that extent the said Whitmore had an equitable charge upon said securities, and no more; and your orator says that it
5 became and was the duty of said Whitmore in the premises as his counsel, attorney, and agent as aforesaid, and under the retainer as aforesaid, in all things to have promoted the best advantage and interest to your orator, and not in any way to have become a purchaser of said securities, or in way interested in such purchase, or to have concealed from your orator any facts or information relative to the premises.

3 And your orator further shows unto your honors, that when he delivered the said bonds and notes to the said Whitmore as aforesaid, and upon the trust aforesaid, he directed the said Whitmore, and the said Whitmore agreed to sue said company and attach sufficient personal property of said company then exposed and liable to attachment, to secure and pay said notes, and your orator pointed out to said Whitmore personal property of said company, and sufficient to pay said notes, and the said Whitmore agreed with your orator to attend diligently to the collection of the same, and if said company refused or neglected to pay the same, then to demand and recover the same of the stockholders of said company, who, by the laws of the State of Maine, were liable for the debts of said company, if said company neglected or refused to pay the same on demand; and your orator says that it became and was the duty of the said Whitmore, as his counsel, attorney, and agent as aforesaid, and in the fair and faithful administration of said trust, to have collected the same as aforesaid.

4. And your orator further shows unto your honors that the mortgage given by the said Kennebec and Portland Railroad Company to secure said issue of bonds of October 15th, 1852, has been foreclosed, and a new corporation formed by the holders thereof under the name of the Portland and Kennebec Railroad Company, and that all of said issue of bonds have been surrendered by the holders thereof to the
6 treasurer of the corporation last named, and certificates of stock therein been issued in exchange therefor for the full amount of principal and interest of said bonds, according to the tenor thereof; and that the said Whitmore has surrendered to said treasurer the bonds entrusted to him as aforesaid by your orator, and has taken out, or caused to be taken out, in exchange therefor, certificates of stock in the corporation last named, as your orator is informed and believes, to the amount and of the full value of twelve thousand dollars.

5. And your orator further shows unto your honors that on or about the first day of October, A. D. 1856, at said Gardiner, your orator not consenting thereto, the said Whitmore, in violation of said trust and of his duty as counsel, attorney, and agent of your orator as aforesaid, caused said bonds to be sold at auction.

6. And your orator further shows unto your honors that the said

Whitmore, as well before as after said sale, pretended and represented to your orator that he had expended large sums of money and incurred great expense for and on account of your orator in the premises, and that his said advances and services, together with the amount due and owing him for his said advances to your orator, greatly exceeded the fair value of said securities entrusted to him as aforesaid; that the sale of said bonds as aforesaid was a bona-fide sale, after due and sufficient notice and advertisement thereof; that said bonds brought all they were fairly worth in the market; that the purchaser was a bona-fide purchaser at said sale; that said notes were of no value and were not collectable of said company, or of the stockholders of said company, and that your orator was largely indebted to him for his said advances and services after he had fairly and faithfully realized out of said securities so entrusted to him all they were fairly worth; and your orator,
7 confiding in him as his counsel, attorney, and agent as aforesaid, believed such representations to be true.

7. And your orator is now informed and believes and charges that the amount due and owing the said Whitmore by your orator, for his said advances to your orator, and on his account and for services rendered as aforesaid, was the sum of twenty-five hundred dollars or thereabouts, and no more; that the representation of the said Whitmore that there was due him from your orator a much larger sum than said securities were fairly worth or than could be fairly realized therefrom, were and are untrue; that the sale of said bonds as aforesaid was not a bona-fide sale upon due notice and sufficient advertisment thereof; that Robert Thompson, who attended said sale and became the purchaser of said bonds, did so by the procurement of said Whitmore; that said Thompson bid in said bonds not for himself or on his own account, but for and on account of said Whitmore, and for much less than the real value therefor, viz, for and at the rate of five cents on a dollar or thereabouts, as your orator is informed and believes; that the said bonds were never delivered to the said Thompson after said pretended sale, and he paid nothing therefor; that said bonds were at the time of the sale and representations aforesaid, as the said Whitmore well knew, of the fair value of sixty-five hundred dollars or thereabouts, and said sale was so made in order to deceive, defraud, and injure your orator in the premises, and for the purpose of defeating and extinguishing said trust, and your orator's right to reclaim and redeem said securities, and that said Whitmore might obtain the title to the same for much less than the real value thereof; that said notes were at the time they were received by said Whitmore, and long afterwards, collectable of said company and of the stockholders of said company, as the said Whitmore well knew; that the said Whitmore has collected and received interest upon said bonds or dividends upon the certificates of stock
8 into which said bonds were converted as hereinbefore set forth, sufficient or nearly sufficient, together with the amount of said notes, to fully indemnify him for his said advances and services made and rendered as aforesaid; and that if said notes have not been collected by said Whitmore the failure to collect the same is attributable solely to the gross neglect and willful default of said Whitmore; by reason whereof he has become and is justly chargeable with the full amount of said notes, together with the interest thereon.

8. And your orator further says that he did not, until lately, by reason of the fraudulent concealments of said Whitmore in the premises, come to a knowledge of the several matters and things whereof it is hereinbefore alleged; that your orator was ignorant touching the fraudulent conduct and practices of the said Whitmore, and that he was wholly ignorant

of his rights in this regard, or that he could have redress at law or in equity by reason of the premises, and remained so till he had consulted counsel and been advised by persons learned in the law just previous to filing this his bill of complaint.

9. And your orator further says that he has within two years of the date hereof duly demanded of the said Whitmore an account of said trust property, and the amount of money collected and received by him from and on account of the same, and the amount now due and owing said Whitmore by your orator, if anything, for his said services and money advanced to or on account of your orator, and the said Whitmore has unreasonably neglected and refused to render such an account, and still neglects and refuses.

All of which actings, doings, and pretences are contrary to equity and good conscience. Forasmuch, therefore, as your orator is entirely remediless in the premises, according to the strict rules of the common
9 law, and can only have adequate relief in a court of equity, where matters of this nature are properly cognizable and relievable: To the end, therefore, that the said Whitmore may, if he can, show why your orator should not have the relief prayed, and may under oath full, true, direct, and perfect answer make to all and singular the matters hereinbefore stated and charged, and that he may full, true, and direct answer make to the several interrogatories hereunder written, and that the said Whitmore may come to a fair and just account with your orator in respect to said bonds and notes so entrusted with him, and all moneys collected and received by him, or which might be collected by him on account thereof, and may be decreed to surrender to your orator after being fully indemnified, all the stock in the Portland and Kennebec Railroad Company received by him as aforesaid, in exchange for said bonds entrusted to him as aforesaid by your orator; and that he may be decreed to execute and deliver to your orator all necessary writings to convey to your orator a good and sufficient title thereto; and in case he is unable to do so, that he may be decreed to pay to your orator the full value thereof in money, in lieu thereof; and that he may be decreed to account to your orator for the full amount of said notes, with lawful interest thereon, if he has collected the same, or if he has failed to collect the same, and the same have been lost by his gross neglect and wilful default; and that your orator may be let in to redeem said bonds, or the stock into which the same were converted, if anything is found due the said Whitmore, upon a fair and just statement of the accounts between him and your orator; and that your orator may have such further and other relief as the nature of this case requires and to your honors shall seem meet,

May it please your honors to grant unto your orator a writ of
10 subpœna, to be directed to the said defendant, commanding him to appear before your honors in this honorable court, as above prayed, and to stand, perform, and abide such orders and decrees as your honors shall from time to time make in this cause, and such final decrees as to your honors shall seem meet.

And so will ever pray, etc.

GEORGE S. MARSH.
A. G. STINCHFIELD,
Solicitor to Plaintiff.

STATE OF MARYLAND, *March* 9, 1869.

Then personally appeared George S. Marsh, above named, and made oath that he has read and fully understands the foregoing complaint by

him signed, and that the same is true of his own knowledge, except the matters therein stated upon information and belief, and as to such matters that he believes them to be true.

Before me,

M. O'S. HANAN,
U. S. Commissioner for Maryland.

Interrogatories to be answered by N. M. Whitmore.

1. Whether the plaintiff, prior to October, 1856, entrusted to you the two notes and the coupon-bonds of the K. and P. Railroad Company, named in the foregoing complaint, to hold as security and in trust,
11 and whether you received the same and agreed to account to him therefor, and whether you was his counsel and attorney at the time.

2. Whether you caused said bonds or notes to be sold at auction about October 1st, 1856, and what advertisement of such sale you gave. Whether they were bid in by one Robert Thompson; and, if so, whether he purchased for himself and on his own account, or for you and your account. Whether you delivered the same to him after said sale, and at what price were they struck off to him; if not bid in by said Thompson, then by whom and for how much?

3. Whether you or any one for you has surrendered said bonds to the treasurer of the Portland and Kennebec Railroad Company, and taken out certificates of stock of said company in exchange therefor, and for the full amount of said bonds and interest, and what amount of stock you or any one for you received in exchange therefor, and by whom were said bonds surrendered and exchanged, and what dividends have been paid thereon?

4. Whether you sued said notes or collected the same, or either of them, of Kennebec & Portland Railroad Company, or the stockholders thereof; and, if not, why not?

5. Whether you represented to the plaintiff after the sale of said bonds that you had made such sale at public auction after duly advertising the same, and such sale was bona fide?

6. Whether a short time prior to said sale you represented to the plaintiff that your claim for money advanced and for services amounted to six thousand dollars?

7. What amount of money you advanced to plaintiff, and when; what notes and claims against him you compromised and took up; the names of the holders and the amount you paid each?

12 8. Whether on or about the 23d day of January last the plaintiff made written demand on you for an account of said trust, and whether you rendered such account, and if not, why not, and whether you have ever rendered such account?

9. Whether you rendered services for the plaintiff, for which you claim compensation? if so, state specifically what, and the amount claimed, giving items.

Whereupon a subpœna in chancery issued, returnable on the first Monday of May, A. D. 1869, (said cause having been duly entered in court and continued to April term of that year,) and on said return day, said subpœna having been returned executed, Artemus Libby, esq., entered his appearance as solicitor for the respondent, on whose motion the complainant was required to furnish security for costs, and the order of court in that behalf was duly complied with. And on the seventh day of July of the same year the respondent filed the following:

of his rights in this regard, or that he could have redress at law or in equity by reason of the premises, and remained so till he had consulted counsel and been advised by persons learned in the law just previous to filing this his bill of complaint.

9. And your orator further says that he has within two years of the date hereof duly demanded of the said Whitmore an account of said trust property, and the amount of money collected and received by him from and on account of the same, and the amount now due and owing said Whitmore by your orator, if anything, for his said services and money advanced to or on account of your orator, and the said Whitmore has unreasonably neglected and refused to render such an account, and still neglects and refuses.

All of which actings, doings, and pretences are contrary to equity and good conscience. Forasmuch, therefore, as your orator is entirely remediless in the premises, according to the strict rules of the common
9 law, and can only have adequate relief in a court of equity, where matters of this nature are properly cognizable and relievable: To the end, therefore, that the said Whitmore may, if he can, show why your orator should not have the relief prayed, and may under oath full, true, direct, and perfect answer make to all and singular the matters hereinbefore stated and charged, and that he may full, true, and direct answer make to the several interrogatories hereunder written, and that the said Whitmore may come to a fair and just account with your orator in respect to said bonds and notes so entrusted with him, and all moneys collected and received by him, or which might be collected by him on account thereof, and may be decreed to surrender to your orator after being fully indemnified, all the stock in the Portland and Kennebec Railroad Company received by him as aforesaid, in exchange for said bonds entrusted to him as aforesaid by your orator; and that he may be decreed to execute and deliver to your orator all necessary writings to convey to your orator a good and sufficient title thereto; and in case he is unable to do so, that he may be decreed to pay to your orator the full value thereof in money, in lieu thereof; and that he may be decreed to account to your orator for the full amount of said notes, with lawful interest thereon, if he has collected the same, or if he has failed to collect the same, and the same have been lost by his gross neglect and wilful default; and that your orator may be let in to redeem said bonds, or the stock into which the same were converted, if anything is found due the said Whitmore, upon a fair and just statement of the accounts between him and your orator; and that your orator may have such further and other relief as the nature of this case requires and to your honors shall seem meet,

May it please your honors to grant unto your orator a writ of
10 subpœna, to be directed to the said defendant, commanding him to appear before your honors in this honorable court, as above prayed, and to stand, perform, and abide such orders and decrees as your honors shall from time to time make in this cause, and such final decrees as to your honors shall seem meet.

And so will ever pray, etc.

GEORGE S. MARSH.
A. G. STINCHFIELD,
Solicitor to Plaintiff.

STATE OF MARYLAND, *March* 9, 1869.

Then personally appeared George S. Marsh, above named, and made oath that he has read and fully understands the foregoing complaint by

him signed, and that the same is true of his own knowledge, except the matters therein stated upon information and belief, and as to such matters that he believes them to be true.

Before me,

M. O'S. HANAN,
U. S. Commissioner for Maryland.

Interrogatories to be answered by N. M. Whitmore.

1. Whether the plaintiff, prior to October, 1856, entrusted to you the two notes and the coupon bonds of the K. and P. Railroad Company, named in the foregoing complaint, to hold as security and in trust,
11 and whether you received the same and agreed to account to him therefor, and whether you was his counsel and attorney at the time.

2. Whether you caused said bonds or notes to be sold at auction about October 1st, 1856, and what advertisement of such sale you gave. Whether they were bid in by one Robert Thompson; and, if so, whether he purchased for himself and on his own account, or for you and your account. Whether you delivered the same to him after said sale, and at what price were they struck off to him; if not bid in by said Thompson, then by whom and for how much?

3. Whether you or any one for you has surrendered said bonds to the treasurer of the Portland and Kennebec Railroad Company, and taken out certificates of stock of said company in exchange therefor, and for the full amount of said bonds and interest, and what amount of stock you or any one for you received in exchange therefor, and by whom were said bonds surrendered and exchanged, and what dividends have been paid thereon?

4. Whether you sued said notes or collected the same, or either of them, of Kennebec & Portland Railroad Company, or the stockholders thereof; and, if not, why not?

5. Whether you represented to the plaintiff after the sale of said bonds that you had made such sale at public auction after duly advertising the same, and such sale was bona fide?

6. Whether a short time prior to said sale you represented to the plaintiff that your claim for money advanced and for services amounted to six thousand dollars?

7. What amount of money you advanced to plaintiff, and when; what notes and claims against him you compromised and took up; the names of the holders and the amount you paid each?

12 8. Whether on or about the 23d day of January last the plaintiff made written demand on you for an account of said trust, and whether you rendered such account, and if not, why not, and whether you have ever rendered such account?

9. Whether you rendered services for the plaintiff, for which you claim compensation? if so, state specifically what, and the amount claimed, giving items.

Whereupon a subpœna in chancery issued, returnable on the first Monday of May, A. D. 1869, (said cause having been duly entered in court and continued to April term of that year,) and on said return day, said subpœna having been returned executed, Artemus Libby, esq., entered his appearance as solicitor for the respondent, on whose motion the complainant was required to furnish security for costs, and the order of court in that behalf was duly complied with. And on the seventh day of July of the same year the respondent filed the following:

Answer.

Circuit court of the United States, district of Maine.

GEO. S. MARSH
vs.
NATHANIEL M. WHITMORE. } In equity.

Answer of Nathaniel M. Whitmore to the bill of complaint of George S. Marsh, complainant.

The said defendant, answering unto said complainant's bill of complaint, says he supposes it is true that the said complainant was the owner of the bonds of the Kennebec & Portland Railroad Company, secured by what is called the second mortgage, to the nominal amount of sixty-five hundred dollars, as is set forth in said bill of complaint, though at
13 the time said complainant claimed to hold said bonds for his brother, Joshua Marsh, and he also supposes it true that said complainant was the owner of the notes made and issued by the treasurer of said corporation, described in said bill of complaint. But he denies that said bonds were of the full value of sixty-five hundred dollars in 1855, and he denies that said notes were of the value of two thousand dollars; and said defendant, further answering, says it is true, as he believes, that said complainant was indebted in the State of Maine, as he has alleged in his bill of complaint, but to what amount the defendant was never informed. And it is also true that the defendant was an attorney at law.

But as to the charge in said bill of complaint that the complainant retained the defendant as his counsel and agent upon the representation of the defendant that he could and would adjust and compromise with the creditors of the complainant upon terms favorable to him, and would, if necessary, advance to the complainant, or on his account, money for that purpose, if the complainant would deliver and entrust to him said bonds and notes, the defendant assuring the complainant that he wished to derive no advantage therefrom, except a fair return for the money advanced for that purpose, and a fair and reasonable compensation for his services in the premises, the defendant says the same is not true; that he never was employed by the complainant as his attorney and agent, or in any capacity, to adjust and compromise with his creditors in Maine, but had previously been employed as his attorney in a reference with one Nash, against him and said railroad company, and was employed as his attorney in the suits in the supreme judicial court of this State, namely, Pray vs. him, Stoddard vs. him, and Williston vs. him; and this was the extent of his employment by the complainant. And
he further says that he never undertook to compromise with the
14 creditors of the complainant, nor to advance money for that purpose, on any terms, and the defendant further says that as to the charge in said bill of complaint that the complainant, at the special instance and request of the defendant, advanced and entrusted to him said bonds and notes to the amount and of the full value of eighty-five hundred dollars, and that he received the same on the trust aforesaid, and faithfully agreed with the complainant not to sell and dispose of the same, except by the consent of the complainant, the same is not true; and the defendant, further answering, says that it is true that on the 13th day of July, A. D. 1855, he did receive of the complainant, who pretended to act for his brother, Joshua Marsh, coupon-bonds of the

Kennebec & Portland Railroad Company, called the second-mortgage bonds, to the nominal amount of sixty-five hundred dollars, to secure H. W. Paine and the defendant against any and all liabilities which they or either of them have or may incur for or on account of said complainant, and especially to secure the payment of three notes of that date, given by said complainant to the defendant; one for $1,143.87, and interest, payable October 10, 1855; one for $1,160.87, and interest, payable January 10, 1856; the other for $1,177.77, and interest, payable April 10, 1856, and to secure the payment of a note for ninety dollars and interest, given by said complainant to Charles Danforth, and signed by the defendant as surety, with authority in defendant to collect the coupons on the bonds as the same might become due, and apply the same on said notes, and for no other purpose, as fully appears by the agreement in writing, dated July 13, 1855, signed Joshua Marsh, by George S. Marsh.

And the defendant, further answering, says that the complainant never paid, or offered to pay, either of said notes, nor any portion thereof, though repeatedly urged to do so; and the same remaining unpaid on the 27th of August, A. D. 1856, he and the said Paine notified the complainant by letter that, if the notes were not paid before that time, he should sell the bonds at auction on the first day of October, A. D. 1856, at the Gardiner Hotel in Gardiner, at ten o'clock a. m., and gave due notice to that effect. But at the earnest solicitation and request of the complainant, and under the assurance that he would soon come to Gardiner and arrange the whole matter satisfactorily, made by letter September 25, 1856, they waived said sale at that time. But the complainant paid no further attention to the matter, and on the 20th day of March, A. D. 1857, the defendant again wrote him urging payment, and notifying him that if the notes were not paid or additional security given, the bonds would be sold at the Gardiner Hotel, in Gardiner, on the 4th day of April, A. D. 1857, at ten o'clock in the forenoon, which letter the complainant afterwards admitted to him he received, but he paid no attention to the matter, but the defendant, still hoping the complainant would adjust the matter, waived said sale till the 26th day of May, 1867, when he advertised said bonds for sale on the 20th day of June, 1867, at ten o'clock in the forenoon, at the Gardiner Hotel, in Gardiner, and notified the complainant in writing of the time and place of sale. And the complainant replied in writing that the defendant must do with said bonds what he thought was best for all concerned, and he fully believed it was best to then sell the same. And after publishing said notice three weeks successively in the Saturday Evening Transcript, a newspaper printed and largely circulated in Gardiner, he sold four thousand five hundred dollars ($4,500) of said bonds at auction at at the time and place appointed in said notice, for the sum of nine hundred dollars and fifty cents, when the sale was adjourned by the auctioneer to the 23d day of said June, at the same place, when the balance of said bonds, being $2,000, were sold at auction for the sum of four hundred and ten dollars. Five hundred dollars of said bonds were purchased by E. A. Chadwick for $100.50, and 1,000 by W. L. Lewis for $204.00. The balance was purchased by the defendant, and immediately after said sale he sent said Marsh the auctioneer's account of the sale, containing the names of the purchasers and the prices paid; and endorsed the proceeds of said sale on the said notes of the complainant. The defendant afterwards bought of said Chadwick and Lewis the bonds purchased by them at the same prices they were sold for. And he says that the prices for which said bonds sold were the full and fair

value of said bonds at that time, and more than he could get offered him at private sales on enquiry for a purchaser. That after that, in 1858 and 1859, said bonds of said railroad depreciated in value so that they sold in the market at ten dollars on the hundred and thereabouts. He further says that in 1858 he sought an interview with the complainant at Augusta, in this State, for the purpose of trying to get a full settlement of his matters with him, and the complainant then stated to him that he received the account of the sales sent him by def't. He then represented to the complainant that there was considerable due him over and above the proceeds of said bonds, and his securities, and urged him to pay, saying to him that though he was not the owner of the bonds, he could get them and would do so, and give up all if he would pay, but the complainant answered, in substance, that he did not think the bonds worth so much as they sold for, that I must keep what I had got, and if he ever got able he would pay the balance.

And said defendant, further answering, says that he did, some time after receiving the bonds as aforesaid, (but the precise time he cannot now tell,) receive of said complainant the notes described in the said bill of complaint, with directions if he could collect anything thereon, to apply it on said notes, and to hold, as additional security for the indebtedness of the said complainant. That when he received said
17 notes they were long overdue, and said Kennebec & Portland Railroad Company was insolvent, its road and all its personal property being under mortgages for much more than the whole was then supposed to be worth. And it is not true that the complainant directed him to sue said company and attach personal property, and pointed out personal property to be attached to secure said notes, and that defendant agreed to do so, but, on the contrary thereof, the complainant well knew the said corporation to be insolvent, and that all its property was under mortgage as aforesaid; nor is it true that the complainant gave directions to have the said notes collected of the stockholders of said corporation, and that the defendant agreed to do so, but the complainant, well knowing the difficulties in enforcing collection by suit, desired defendant to see Mr. Reuel Williams, then president of said company, and try and induce him to pay something on said notes, and he did so, but without success. The defendant was as anxious to collect said notes as the complainant was, as he knew the complainant to be insolvent, and did not regard the security which he held as sufficient, even if he could collect and appropriate the whole of said notes towards the liabilities of said Marsh. Being anxious to get something on said notes, he did, after failing to get any payment from Mr. Williams in the year , put them in suit against said company, with a view of enforcing collection of some of the stockholders, but the suits were defended, and before he could get judgment the supreme judicial court of this State decided that the stockholders were not liable, and that purpose was abandoned. At the interview in Augusta, in 1858, the situation of the notes as aforesaid was fully explained to the complainant, as well the bonds, when he said to defendant that he must keep what he had got as before stated. Defendant still has said notes, no portion thereof ever having been paid, and said Kennebec & Portland Railroad
18 Company having continued to be hopelessly insolvent ever since he first received them.

The defendant, further answering, says that it is true that the forms of foreclosure of what is called the second mortgage of said corporation have been gone through with, and a new corporation has been organized, of the holders of the second bonds, and new stock representing the

bonds has been issued to the holders thereof. Five thousand dollars of the bonds described in complainant's bill was issued to John and Samuel Whitmore, the owners thereof, and one thousand five hundred dollars to the defendant, and three dividends of three dollars per share have been made and paid by said new corporation, and that is all that has ever been paid upon them. Said bonds were worth, in the market, from the year 1857 to 1864, from ten to twenty-five per cent. of their nominal value, since which time the stock representing the said bonds has been increasing in value, till it is worth about 75 per cent.

And the defendant, further answering, says that it is not true as alleged in the bill of complainant that he pretended and represented to the complainant that he had expended large sums of money and incurred great expense for and on account of the complainant. But, on the contrary thereof, he did not incur expense nor expend money for complainant in the premises, except to purchase an execution in favor of Thos. C. Wadley against him for $91.51, but the only demands he had against him were the notes and for the services rendered for him in the cases and said execution as before specified. And these were the only claims which he ever pretended to have against the complainant, nor is it true that he ever represented to the complainant after receiving said bonds as aforesaid, that he had advanced anything on his account to compromise with his creditors or purchase their claims excepting said execution.

19 And he avers that he did not after that time advance any money on account of the complainant for any purpose except to pay the small fees and charges incident to the suits in which he was employed and said execution. And the said defendant further avers that he was never guilty of any fraudulent practices towards the complainant in any way, nor did he in any way conceal any facts in regard to the premises from the complainant, but, on the contrary thereof, the sale of said bonds was fair, in good faith, after due notice, made for the purpose of realizing the most possible for the complainant from the same, and when they were depreciating in the market, and continued to do so for some years after, till they were worth but half as much as they were sold for at the sale; that all the facts were fully stated to the complainant and he fully approved and ratified the proceeding in regard to the sale of said bonds. And he submits that if he had not so ratified and approved said proceedings, he has been guilty of such laches, after having a full knowledge of the facts, that he is not entitled to the relief prayed for in his bill of complaint. And he further says that the complainant has never, at any time demanded any account of the defendant, unless the paper hereto annexed, marked "A," handed him by one E. Berry in January last shall be decreed a demand, and he avers that he had no knowledge that A. G. Stinchfield was attorney for the complainant or acting for him at that time, nor until this bill of complaint was filed.

And the defendant, further answering unto the specific interrogatories in said bill of complaint contained, says:

1. The complainant did deliver to the defendant said bonds on the 13th day of July, 1855, and said notes, one in February, 1856, the other in the fall of that year, as near as the defendant can recollect, to be held by him as security, as is fully set forth in this answer. There was no agreement to account other than that which would be implied by

20 law. The defendant was counsel in the suits before specified in this answer, and not otherwise.

2 He did cause the bonds to be advertised and sold, as is before fully set forth in this answer. He took particular pains, in addition to the notice hereinbefore specified, to notify such parties as he had reason

to believe would wish to purchase such bonds, and the sale was fairly attended, and there were several bidders, but he cannot now specify who they were. The complainant was personally notified as early as the first day of June, 1867, or thereabouts, of the time and place of the sale. Robert Thompson was not the purchaser of any of the bonds. The names of the purchasers and the prices for which they sold are hereinbefore fully specified.

3. The bonds have been surrended, as is hereinbefore fully specified, and stock has been issued by the Portland and Kennebec Railroad Company for the full amount of said bonds and interest. The precise amount the defendant is not now able to state.

4. He did sue said notes, but has never collected the same from the stockholders or otherwise, for the reasons hereinbefore fully set forth.

5. He did after said sale send to the complainant the auctioneer's account of the sale, giving names of purchasers and prices for which the bonds sold, and afterwards, at the interview in Augusta, in 1858, he did state to the complainant, in substance, but not in the precise words, that he made the sale at auction after duly advertising the same, and that the sale was a good sale. He did not, to his recollection, use the words "bona fide." He then stated to the complainant the gross amount of the sale, and that it had been applied on the notes.

21 6. He did not, a short time prior to the sale, represent to the plaintiff that his claims against him for money advanced and for services amounted to six thousand dollers.

7. He did not advance to plaintiff any money after July 13, 1855, when he settled with him and took his notes, and did not compromise to take up any claims against him, but a short time after, at the special request of the plaintiff, and to save him from arrest, he did pay the execution to Wadley, before specified, and plaintiff agreed to pay him therefor. The amount was $91.51.

8. Plaintiff did not make a demand in writing or in any other way, in January last, for an account, unless the paper handed him by E. Berry, hereto annexed and made part of this answer, shall be deemed a demand. He did not regard it a demand by plaintiff, and had no account to render, of my trust with him, as the bonds had been duly sold, and plaintiff, with a full knowledge of all the facts, had directed him to keep the notes, as well as the bonds, as his own. The only account to be stated was the balance due on the notes of plaintiff, the amount paid Charles Danforth to take up the note held by him, the sum paid for the Wadley execution, and defendant's account for services in the suits specified. He has been always ready to make out his account and a full statement of the balance due, whenever plaintiff would pay him such balance.

9. He did render services for the plaintiff in the suits before specified, for which he claims compensation. The full amount of my bill is $300, as appears by the bill of items annexed, marked "B," which is made a part of this answer.

NATHANIEL M. WHITMORE.

DISTRICT OF MAINE:

PORTLAND, *July* 5, 1869.

Then personally appeared the above-named Nathaniel Whit-
22 more and made oath to the allegations of the above bill that they are true, except those things alleged upon information and belief, and those he believes to be true.

Before me.

WILLIAM HENRY CLIFFORD,
U. S. Commissioner, Maine District.

"A."

To N. M. WHITMORE, Esq.:

You will please hand to me, within thirty days after the receipt of this, an account in writing of the amount of the securities upon the Kennebec & Portland Railroad Company, transferred to you as collateral by George S. Marsh; the date of such transfer, the amount of your claims and liens upon the same, if any, and the amount realized by you from the same, and when.

A. G. STINCHFIELD,
Att'y E. BERRY.

HALLOWELL, *January* 7, 1869.

"B."

George S. Marsh to N. M. Whitmore, DR.

Feb., 1855.	For defence of suit, Nash *vs.* you, before referees at Brunswick, trial five days, and preparing defence.....	$150
23 Jan., 1858.	For services in defence of suit—Pray *vs.* you. Term fees for preparing for defence, &c., entered at August term, 1855, S. J. C., Kennebec County, and defended to August term 1857, defendant to be heard in damages, and ex. issued Feb. 8, 1858; in court eight terms	50
Same services, and preparing for defence in Williston *vs.* you ...		50
Same services in Stoddard *vs.* you, in January court		50
		$300

And on the 17th day of August, A. D. 1869, was filed the following agreement as to parties defendant:

U. S. circuit court, district of Maine.

GEO. S. MARSH *vs.* N. M. WHITMORE. } In equity.

It is hereby agreed by the said defendant, N. M. Whitmore, that he will waive all objections to the non-joinder of John Whitmore and Samuel Whitmore, as parties to the said bill. And it is further agreed that the above cause may be proceeded in, heard, and decided, and the rights of the complainants be fully determined, without the joinder of said John Whitmore and Samuel Whitmore. And if the complainant shall be entitled to a decree in his favor, the said N. M. Whitmore hereby consents that such decree may be entered against him personally in the same manner, and to the same amount and effect as if he now held the stock into which the bonds mentioned in said bill and answer were converted.

ARTEMAS LIBBEY,
Solicitor for N. M. Whitmore.
A. G. STINCHFIELD,
Solicitor for Complainant.

AUGUST 16, 1869.

24 And on the 12th day of September, A. D. 1869, was filed the following general replication:

Circuit court of the United States, district of Maine.

GEO. S. MARSH
vs. In equity.
NATHANIEL M. WHITMORE.

The replication of Geo. S. Marsh, the complainant, to the answer of N. M. Whitmore, def't in the above-entitled case.

This repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies in the said answers, for replication thereunto, says, that he will aver and prove his said bill to be true, certain, and sufficient in law to be replied unto, and that the said answer of the said def't is uncertain, untrue, and insufficient to be replied unto by this repliant. Without this, that any other matter or thing whatsoever, in the said answers contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true.

All which matters and things this repliant is and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays, as in and by his said bill he has already prayed.

By A. G. STINCHFIELD,
His Solicitor.

Said cause was thence continued, from term to term, to April term, A. D. 1871, the time for taking the testimony therein having been duly extended from time to time, and at said April term publication of said testimony was ordered, and is as follows:

Deposition of plaintiff, taken March 10, 1870.

25 Interrogatories to be propounded to George S. Marsh, of Maryland, in his own behalf, in the matter of himself, in equity against N. M. Whitmore, pending in the U. S. circuit court, district of Maine:

1. Please to state if you constructed the Kennebec & Portland Railroad, and when, and whether you were then a citizen of Maryland.

2. Whether you were the holder and owner of second-mortage bonds and notes of said company in the year 1855.

3. Whether you delivered to the defendant that year such bonds and notes; if so, what amount, and for what purpose?

(Objected to on the ground that the contract under which the bonds were delivered was in writing.—A. Libbey, defendant's solicitor.)

4. State the value of said bonds at the time, and afterwards, if you know.

(Question objected to as calling for incompetent evidence.—A. Libbey, defendant's solicitor.)

5. Whether or not said company was solvent and had sufficient attachable property at the time you delivered to him said notes; what directions you gave and what was then said about the collection and appropriation thereof.

6. Whether defendant was your counsel and legal adviser at the time of such delivery, and prior and subsequent thereto, and how long.

7. Whether you had notice of the sale of said bonds and notes, if any; if so, when, what notice, and how given.

26 8. If Col. Edgerton delivered your notice for defendant, state

what he said at the time, and what message he delivered from the defendant to you, if any.

(Question objected to as calling for incompetent evidence.—A. Libbey, defendant's solicitor.)

9. Whether you have examined the account against you, annexed to defendant's answer; if so, whether you are indebted to him as therein charged.

10. When you first knew, if at all, that said bonds were bid in by the defendant, and what conversation you had with him in relation thereto, and when.

11. Do you know, or can you set forth, any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matters in question, in this cause? If yea, set forth the same fully and at large in your answer.

By A. G. STINCHFIELD,
Plaintiff's Solicitor.

Cross-interrogatories to be propounded to George S. Marsh:

1. Was the agreement under which you delivered the bonds to Mr. Whitmore in writing and signed by you?

2. If you state the value of the bonds, what means have you of knowing their value at the time you delivered them to defendant, and at any time afterwards?

3. State when you delivered the notes to defendant.

4. Had not the Portland & Kennebec Railroad Company suspended payment before you delivered the notes to defendant? Were you
27 not then or before that time informed, and did you not know the whole property of the company was under several mortgages at that time?

5. If you state you had notice of the sale, was it in writing? If so, please annex it to your deposition.

6. State whether you had corresponded with Mr. Whitmore by letter, in regard to the sale of the bonds. Please annex to your deposition all letters you have received from Mr. Whitmore in regard to the bonds and notes.

7. State whether the defendant met you in the court-house in Augusta, in 1858, and explained to you the sale of the bonds and the situation of the notes, and what you said to him, if anything.

8. Please annex a full statement of your account with defendant, giving debt and credit.

9. In giving your answers, have you any written memorandum from which you make your statements, or to which you refer? If so, who made it?

10. Has a copy of the interrogatories and cross-interrogatories been furnished you by any one? If yea, by whom?

A. LIBBEY,
Solicitor for Defendant.

GEORGE S. MARSH, a witness of lawful age, produced on the part of complainant, being duly sworn, deposes and says as follows, to wit:

To the first interrogatory he saith: I did. I commenced it in 1847 and finished it in January, 1852. I was then a citizen of Maryland.

To the second interrogatory he saith: I was.

To the third interrogatory he saith: I did. I delivered him $6,500

bonds and two notes of $1,000 each, as security for about $3,000, which I had borrowed of him, and for which I had given him my notes on time.

28 To the fourth interrogatory he saith: At the time the bonds were delivered they were at par. After that, I do not know, except from the report of the defendant in this case.

To the fifth interrogatory he saith: It was solvent, and they had sufficient attachable property, both personal and real. When I gave him the notes I gave him orders to sue them immediately and attach property, which property I pointed out to him.

To the sixth interrogatory he saith: He was, and had been prior, and he continued to be my counsel until 1858.

To the seventh interrogatory he saith: I had, on the 1st October, 1856, or a little prior thereto. Mr. Edgerton handed me a letter, stating that the sale would take place at that time, and that the defendant wanted my consent to the sale.

To the eighth interrogatory he saith: When Col. Edgerton handed me the letter, he said that defendant wanted him to urge me to consent to the sale. I wrote to the defendant, saying I would not consent to the sale at that time.

To the ninth interrogatory he saith: I have examined the account, and I am not indebted to him as in the account charged. All that I did owe him was for the notes he held.

To the tenth interrogatory he saith: I first knew of the bonds being bid in by defendant in 1869. I had a conversation with him a few years prior, and he said he had no interest in the bonds; that it was a bona-fide sale.

To the eleventh interrogatory he saith: The defendant was my counsel. He neglected my business very much. He let two judgments go against me; one of Williston's, for $3,000, and one of Stoddard's, for $1,000, which caused me a good deal of trouble to get set aside, and cost me about $500.

Cross-interrogatories.

To the first cross-interrogatory he saith: I think it was.

29 To the second cross-interrogatory he saith: The interest was paid regularly on them, and I considered them par.

To the third cross-interrogatory he saith: I delivered them in 1855; the exact date I cannot state, having lost the receipt.

To the fourth cross-interrogatory he saith: I think not; I knew that the road was mortgaged, but not the entire property of it.

To the fifth cross-interrogatory he saith: I had notice in writing, in the letter which Mr. Edgerton handed me. I have looked for said letter, but cannot find it.

To the sixth cross-interrogatory he saith: I have no recollection of so doing. I have no letters from Mr. Whitmore that I can find. I find no letters among my papers relating to this case.

To the seventh cross-interrogatory he saith: I have some faint recollection of meeting him some time, but can't say when or where; the substance of the conversation I cannot recollect.

To the eighth cross-interrogatory he saith: The substance of the account I have already stated, but I am unable to file an account by reason of the loss of my papers.

To the ninth cross-interrogatory he saith: I have none.

To the tenth cross-interrogatory he saith: They have not.

GEORGE S. MARSH.

PLAINTIFF'S EXHIBIT, (A.)

Second mortgage.

Know all men by these presents that the Kennebec and Portland Railroad Company, in consideration of two hundred and fifty
30 thousand dollars to them paid by John Patten, of Bath, Joseph McKeen, of Brunswick, and Marshal S. Hagar, of Richmond, as trustees, appointed by the stockholders in said company at their annual meeting, held on the seventh inst., to take and hold security for the holders of the bonds of said company then authorized to be issued, the receipt whereof is acknowledged, do hereby grant, sell, and convey to the said Patten, McKeen, and Hagar, as trustees, and to their successors in that trust, all their railroad, as now made, from Portland to Augusta and from Brunswick to Bath, inclusive; and all their corporate property, real and personal; and the franchise of said company, including the road and superstructure; and all the land conveyed to said company by others, for a description of which reference is to be had to the several deeds recorded in Cumberland, Lincoln, and Kennebec, as well as the right of way paid for; and all the buildings thereon; and the personal property, consisting of engines and tenders, passenger, freight, platform, and dirt cars, snow-plows and apparatus of every description, subject, however, to prior mortgages thereon:

To have and to hold the same to the said Patten, McKeen, and Hagar, as trustees as aforesaid, and to their successors in that trust for the sole benefit of the persons who are or may be holders of the bonds of said company, issued and to be issued pursuant to said vote of the stockholders, in the proportion in which persons may hold the same.

Provided, however, that if said railroad company shall well and promptly pay, semi-annually, the interest on their bonds dated October 15, 1852, issued pursuant to the vote of the stockholders, amounting in all to two hundred and fifty thousand dollars, and each bond having thereon the certificate of said trustees that the payment of it is secured by the mortgage, and shall also pay the principal of said bonds when due, then this deed to be void, otherwise to remain in full force.

31 In testimony whereof the said railroad company, by Reuel Williams, their president, duly authorized for the purpose, hereunto set their hand and corporate seal the fifteenth day of October, A. D. 1852.

REUEL WILLIAMS, [L. S.]
President.

Signed, sealed, and delivered in presence of—
EBEN FULLER,
J. A. GILMAN.

Countersigned:

A. H. GILMAN,
Treasurer.

KENNEBEC, *ss:*

October 16, 1852. Then the above Reuel Williams acknowledged the foregoing to be the free act and deed of the Kennebec and Portland Railroad Company.

Before me,

EBEN FULLER,
Justice of the Peace.

KENNEBEC, *ss:*

Received Nov. 2, 9½ a. m., 1852. Entered and compared with the original by

A. STARKS,
Register.

32 PLAINTIFF'S EXHIBIT, (B.)

SCHEDULE E.

Comparative statement of receipts of Portland and Kennebec Railroad.

	1864.	1865.	1866.	1867.	1868.	1869.
For passengers	$304,917 84	285,291 15	251,485 73	246,476 68	248,637 20	284,817 41
Merchandise	191,909 31	219,816 13	295,796 10	296,591 89	315,461 72	332,562 17
Extra baggage	783 44	738 08	808 88	1,733 79	448 55	353 65
Mail-service	11,200 00	11,200 00	11,200 00	11,200 00	11,200 00	11,200 00
Express-service	5,600 00	6,000 00	6,000 00	8,033 30	10,871 43	8,274 00
Car use on other roads	2,139 54	1,257 15	11,113 88	12,444 50	13,203 45	14,100 56
	516,543 13	524,302 51	576,404 59	576,469 16	599,821 35	631,307 79
For military service in past year	17,994 44	5,398 31	34,449 82	1,904 29	3,372 31	313 35
Rents	.....	615 88	1,964 10	1,101 93	1,998 37	1,141 72
	$534,467 57	530,316 70	612,118 51	579,473 38	605,543 04	632,762 86

Comparative statement of passengers and merchandise transported.

	1864.	1865.	1866.	1867.	1868.	1869.
No. passengers	312,771	272,548	278,197	283,796	300,633	321,417
Tons merchandise	92,547.60	99,623.06	133,875.10	137,602.00	149,419.36	163,896.20

33 PLAINTIFF'S EXHIBIT, (C.)

Total amount of sinking fund of Kennebec & Portland Railroad Company, July 31, 1869, as shown by report of commissioners, $347,528.48.

PLAINTIFF'S EXHIBIT, (D.)

GARDINER, *March* 20, 1856.

BROTHER MARSH: Yours of the 17th inst. is received, and in reply, I have not commenced suits on those notes yet, and for this reason I could not get an officer to serve them and make the attachment of property unless he had a good indemnifying bond. I did not think it best to move until we were prepared with such a bond; and the road is not growing any worse. As to the suits against you, they are continued, although I had some trouble to get them continued. The bonds of our road were sold at auction at $65 on the $100. There is no sale for the old stock. I should like to see you and make an arrangement to get some money. I have got to raise $6,000 by 20th of April, and depend upon you to aid me.

You see that I must have things certainly fixed, so that I may not be disappointed. Please write me as soon as you receive this, and let me know what amount of money I can depend upon.

Yours, truly,

N. M. WHITMORE.

PLAINTIFF'S EXHIBIT, (E.)

This is the same as found annexed to defendant's answer on page 22 and which was served on defendant January 23, 1869.

34 PLAINTIFF'S EXHIBIT, (F.)

Outside address of letter from Whitmore & Paine to plaintiff, of August 27, 1856. The letter itself is filed by defendant as Exhibit No. 5:

GEORGE S. MARSH, ESQ.,
Calais, Me.

By Mr. EDGERTON.

EVIDENCE OF RESPONDENT.

Deposition of J. W. Bradbury, taken April 15, 1871.

I, James W. Bradbury, of Augusta, in the county of Kennebec and State of Maine, of lawful age, on oath depose and say, in answer to the verbal interrogatories, as follows, viz:

Ans. to interrogatories by def't's att'y:

I had some acquaintance with the second-mortgage bonds of the Kennebec & Portland Railroad Company from the time of their issue, in 1852, till the foreclosure of the mortgage, about ten years afterwards. I knew the market-value of their bonds in this market in 1856, 1857, and 1858. In the spring of 1856 there was a quantity of them sold at auction, at thirty cents on the hundred. They declined in price from that time, so that in 1857 I think the market-price was from 10 to 15 per cent., and I think they were at about the same price in 1858. I do not think that I can state how early in 1857 they reached that price. I think they began to rise in value in 1859 or 1860. I am not positive how soon this rise commenced, but I know that in the spring of 1863
35 they sold as high as thirty per cent. I think I purchased some of these bonds in 1863 at private sale, but only a small amount.

In 1863 some of these bonds were sold to Mr. Cushman for thirty per cent. flat, (with coupons on.) They were sent on for sale by Mr. George S. Marsh, and Mr. Meserve negotiated the sale with Mr. Cushman. I took some of them in payment of an account I had against Marsh, at the same rate. There were overdue coupons on these bonds, but to what amount I do not know.

I remember that Mr. Marsh was in Augusta during the pendency of a petition for review, either in the case Williston against him, or Stoddard against him, in which he was the petitioner. I should think it was in 1858 or 1859, but cannot now state more definitely without reference to the records.

(The foregoing evidence, on direct examination, was seasonably objected to as incompetent and irrelevant.)

Cross-examination:

The whole amount of these bonds was $250,000, issued October 15, 1852, and secured by a mortgage on the road and rolling stock, subject to prior mortgages. I understand the prior mortgages to have been:

1st. The Yarmouth mortgage, so called, for $202,400.

2d. That securing the cities and towns, including the "Bowdoinham & Richmond," so called, for $800,000.

3d, That securing the first-mortgage bonds, so called, amounting to $230,000. The interest on the first and second bonds was paid up to, and including the coupons falling due, October 15, 1855.

The interest upon the Yarmouth stock, so called, has been paid up to the present time, excepting two semi-annual dividends in 1857 and 1858, which was postponed,

I owned some of the city and town bonds, and I have received
36 the interest on my bonds. I understand there was a sinking fund established for the liquidation of a portion of the city and town loan.

The road extends from Augusta to Portland, and from Brunswick to Bath, in all about 70 miles.

I do not know of any stock board, at Augusta or Gardiner, and I never knew of any.

I have acted as an attorney for the Portland and Kennebec Railroad Co., more or less, since its organization.

The firm of Bradbury, Morrill and Meserve, of which I was member, was employed to obtain reviews in the cases Williston and Stoddard *vs.* Marsh.

Ques. by pl'ff's att'y. Was your firm employed by Marsh, and did you try said causes upon review?

(Question objected to as irrelevant and incompetent.)

Ans. We were both employed by Marsh and tried one or both of said cases, I think both.

2d. By same. To what amount were the former judgments reduced, upon the trial upon review?

(Objected to as incompetent evidence.)

Ans. Very considerably. I cannot say how much.

3d. By same. Will you examine and state what amount?

(Objected to as incompetent.)

Ans. The records of the court will probably show.

4th. By same. Are you counsel for Mr. Whitmore in an action against the Kennebec and Portland Railroad, on one or more notes that came to him from Mr. Geo. S. Marsh? If so, state the amount of said notes.

(Objected to as incompetent.)

Ans. I am counsel for Mr. Whitmore in an action against said railroad company. And I think the action is for money had and received. I have in my possession a note for $1,000 as evidence in said action.

5th. By same. Please annex a copy of said note.

37 Ans. I will, if the note is in my office and not filed in court, and mark it "A."

6th. By same. Is the suit now in court?

Ans. It is.

7th. By same. Do you know of the market-value of the second-mort. bonds of the K. and P. R. R. Co., from 1856 forward, except as you had dealt in the same?

Ans. I had. I very frequently knew of the sale to others.

8th. By same. Please specify such sales as you have personal knowledge of.

Ans. I cannot fully, at this late day. I recollect the sale at auction by Mr. Williams, in 1856. I knew of Alden's purchasing from time to time. I knew of the sale of $10,000 or $11,000 of them by the Freeman's Bank.

9th. By same. Do you know, except by hearsay, what the bonds sold for?

Ans. I was present at the sale by Mr. Williams, and I was informed by Mr. Alden and the Freeman's Bank of the price paid for the bonds of the bank.

(The foregoing evidence and cross-examination was seasonably objected to as incompetent and irrelevant.)

Direct. Whether the Kennebec and Portland R. R. Co. failed, became insolvent, and when and whether they have continued to be insolvent ever since.

(Objected to as irrelevant.)

Ans. That corporation failed and became insolvent in the latter part of 1855, and have continued insolvent ever since.

Ques. 2d. Have you known of any means of collecting debts against said corporation since 1855?

Ans. All its property, so far as I knew, was covered by mortgages, and I had many demands in my office for collection which I was unable to collect or secure. I could discover no such means.

38 Cross resumed:

Ques. Were not the stockholders abundantly able to pay?

Ans. Some of them were. I brought an action against one of them, the case of Coffin et als. vs. Rich, and the supreme judicial court decided that the stockholders were not liable.

J. W. BRADBURY.

(A.)

$1,000.] AUGUSTA, *Dec. 30th*, 1854.

For value received, the Kennebec and Portland Railroad Company promise to pay to the order of their treasurer, one thousand dollars in nine months, and interest.

(Signed) A. H. GILMAN, *Treasurer.*

Endorsed: A. H. Gilman, treasurer. G. S. Marsh. F. A. Pike.

Deposition of Darius Alden, taken April 15, 1871.

I, Darius Alden, of Augusta, in the county of Kennebec, and State of Maine, of lawful age, on oath depose and say, in answer to the verbal interrogatories, as follows, viz:

Ans. to interro. by deft's att'y.

I have been acquainted with the second-mortgage bonds of the Kennebec and Portland Railroad Co. from 1855, and knew their market-value in 1855, 1856, and 1857 on the Kennebec. During those years I bought and sold from $40,000 to $75,000 of these bonds. Their market-value in 1855 was, I think, about $30 on the $100, and the price
39 was about the same in 1856. During that year I purchased $5,000 of these bonds at the Augusta house at auction, at 30 per cent. I think that in 1851 I purchased at from .10 to .15, and sold at 20 per cent. In 1858 or 1859, I purchased $10,000 of these bonds, with the overdue coupons on them, at 8 per cent., paying for the whole amount $800.

In 1859, I think, I purchased some $10,000 of these bonds of the Freeman's Bank of Augusta—on reflection, I think the purchase of this lot of bonds was made in 1861—and paid them 10 per cent. on principal and overdue interest therefor.

In 1859 and 1860 the price was about the same as in 1858 and 1861. I continued to purchase at about the same price, till the Williams purchase was made, in the fall of 1862, I think. After that time, I purchased at from 30 to 60 per cent. from time to time, paying nothing for the back interest.

I heard of the sale of the Marsh bonds at Gardiner. I heard before he sale took place, but did not attend. Mr. Hagar (Marshal S.) informed me that the sale was to take place. We talked about buying them, and concluded not to go to the sale.

(The foregoing evidence, on direct examination, was seasonably objected to as incompetent and irrelevant.)

Cross. I only speak confidently of what bonds I bought and sold myself.

I knew of no stock board in Gardiner or Augusta.

The second-mortgage bonds were surrendered and converted into stock of the Portland and Kennebec Railroad Co. I think these bonds have been coming in since the organization of the company and stock issued therefor, and up to the present time. I hold in my hand a certificate of said stock, by which it appears that the company was
40 organized May 20th, 1862. The certificates of stock of the Portland & Kennebec Railroad Company were issued for the full amount of the principal and interest of these bonds. I think that the interest on these bonds is cast up to May 20th, 1862, when presented for conversion, and certificates of stock issued for the amount. I think that there may have been stock or cash dividends paid on this stock since May 20th, 1862. The stock or cash dividends cover every year since May 20th, 1862. I am a director in the Portland & Kennebec Railroad Company. I presume the stockholders own the entire road, subject to the prior debts. I think the amount due on the city and town loan is less than $200,000. I knew of about $50,000 of the Yarmouth that has been paid. At the date of our last report I think the sinking fund amounted to about $400,000. I only knew by the report. Mr. Whitmore was a director in the Kennebec & Portland Railroad Company, and a director in the Portland & Kennebec Railroad Company.

(The foregoing evidence, on cross-examination, was seasonably objected to as incompetent and irrelevant.)

Direct. Mr. Reuel Williams sold the first lot of bonds which I purchased. The payments that have been made of the prior securities were made by issuing a new bond which sold at from 85 to 87½ per cent.

Cross resumed. Please examine the reports of the Portland & Kennebec Railroad Company for the year ending Dec. 31, 1870, and annex Schedule "E" of the report, and the statement of the present condition of the sinking fund, to your deposition.

(Objected to as incompetent.)

Ans. I will annex said statement and make it "A."

(Defendant objects to the answer and to the paper annexed.)

D. ALDEN.

41 "A."

Present condition of the sinking fund.

Rec'd for land sold as per last report		$1,186 00
" " annual July percentages		229,425 00
" " interest as per last report	$152,769 02	
" " " last year	26,369 38	
		179,138 40

" " premiums as per last report	18,191 19	
" " " last year	2,167 67	
		20,358 86
		$430,108 26

PER CONTRA.

Invested in Augusta scrip	95,000 00	
" Bath "	69,000 00	
" Gardiner "	66,000 00	
" Hallowell "	60,100 00	
" Brunswick "	33,100 00	
" Topsham "	14,500 00	
" Maine 6's of 1889	1,500 00	
" U. S. 6's of 1881	17,000 00	
" U. S. 5-20's	37,500 00	
		393,700 00
Paid interest as per last report	4,317 16	
" last year	1,850 69	
		6,167 85
" premiums as per last report	1,250 57	
" premiums last year	3,686 05	
		4,936 62
Cash on hand July 30, 1870		25,303 79
		$430,108 26

Amount of sinking fund in cash and investments, at par.. $419,003 79

42 The commissioners are happy to report that all arrears due to the sinking fund have been fully paid. Taking into account the interest which will accrue on present investments, the sinking fund, Nov. 1, 1870, will reach the sum of $430,000; and that amount will not suffer diminution by reason of the tax assessed in the year 1868, (referred to in our last report,) for the supreme court has decided that it cannot be legally enforced.

JAMES W. NORTH,
JOSEPH H. WILLIAMS,
Commissioners.

AUGUSTA, *July* 30, 1870.

AUGUSTA, *Jan.* 31, 1871.

The commissioners now state the amount of town and city bonds in their hands to be	432,200
Cash	3,248
Present condition of sinking fund	$435,448

J. S. CUSHING,
Treasurer.

43 SCHEDULE E.

Comparative statement of receipts of Portland and Kennebec Railroad.

	1864.	1865.	1866.	1867.	1868.	1869.	1870.
For passengers	$304, 917 84	285, 291 15	251, 485 73	246, 476 68	248, 637 20	264, 817 41	281, 209 33
Merchandise	191, 909 31	219, 816 13	295, 796 10	296, 591 89	315, 461 72	332, 562 17	328, 836 44
Extra baggage	783 44	738 08	808 88	1, 723 79	448 55	353 65	591 65
Mail-service	11, 200 40	11, 200 00	11, 200 00	11, 200 00	11, 200 00	11, 200 00	11, 200 00
Express-service	5, 600 00	6, 000 00	6, 000 00	8, 032 30	10, 871 43	8, 274 00	8, 153 82
Car use on other r'ds	2, 132 54	1, 257 15	11, 113 88	12, 444 50	13, 203 45	14, 100 56	15, 054 21
	516, 543 13	524, 302 51	576, 404 59	576, 469 16	599, 821 35	631, 307 79	645, 064 05
For military serv. in past year	17, 924 44	5, 398 31	34, 449 82	1, 904 29	3, 723 31	313 35	.....
Rents	.....	615 88	1, 264 10	1, 101 93	1, 998 37	1, 141 72	1, 199 84
	$534, 467 57	530, 316 70	612, 118 51	579, 475 38	605, 543 04	632, 762 86	646, 264 29

Comparative statement of passengers and merchandise transported.

	1864.	1865.	1866.	1867.	1868.	1869.	1870.
No. passengers	312, 771	272, 548	278, 197	283, 796	300, 633	321, 417	362, 970
Tons merchand'se	92, 547 60	99, 693 06	133, 875 10	137, 602 00	149, 419 36	163, 826 20	177, 618 00

44 DEFENDANT'S EXHIBIT No. 1.

Deposit of bonds.

I have left and deposited with N. M. Whitmore, sixty-five hundred dollars in bonds against the Kennebec & Portland Railroad Company, Briggs's bonds, numbered as follows, viz., bond No. 82, of $500; bond No. 93, of $500; bond No. 86, of $500; bond No. 84, of $500; bond No. 91, of $500; bond No. 50, of $500; bond No. 78, of $500; bond No. 88, of $500; bond No. 132, of $1,000; bond No. 131, of $1,000; bond No. 71, of $500.

Said bonds having been taken and received in part payment of the award in favor of George S. Marsh, against said company, and being nominally for said sum of six thousand five hundred dollars to indemnify said Paine & Whitmore against any and all liabilities they and each of them have and may incur for or on account of George S. Marsh, and especially to secure the payment of three notes of hand, given by said George S. Marsh, and by him signed, payable to said Whitmore or order. The first of said notes being for the sum of eleven hundred and forty-three dollars and ninety-seven cents and interest, payable October 10th, next; the second note being for the sum of eleven hundred and sixty dollars and eighty-seven cents and interest, payable January 10th, 1856; the third for the sum of eleven hundred and seventy-seven dollars and seventy-seven cents and interest, payable April 10th, 1856; and shall also pay a certain note to Charles Danforth, of ninety dollars and interest, signed by said George S. Marsh as principal, and said Whitmore as surety, and save said Whitmore harmless therefor. The coupons on said bonds may be applied by said Whitmore towards said notes.

JOSHUA MARSH,
By G. S. MARSH.

GARDINER, *July 13th*, 1855.

45 DEFENDANT'S EXHIBIT No. 2.

$1,143.97.]

Value received I promise to pay N. M. Whitmore, or order, eleven hundred and forty-three dollars and ninety-seven cents and interest, the tenth day of October next.

G. S. MARSH.

GARDINER, *July 13th*, 1855.

$1,160.87.]

Value received I promise to pay Nath'l M. Whitmore, or order, eleven hundred and sixty dollars and eighty-seven cents and interest, the tenth day of January next.

G. S. MARSH.

GARDINER, *July 13th*, 1855.

$1,177.77.]

Value received I promise to pay Nath'l M. Whitmore, or order, eleven hundred and seventy-seven dollars and seventy-seven cents and interest, the tenth day of April next.

G. S. MARSH.

GARDINER, *July 13th*, 1855.

Endorsements.

On each of the above notes is endorsed $435, as of June 23d, 1857, "By sale of 2d mortg. bonds of K. & P. R., sold by auct'r."

Each is also endorsed by "Nath'l M. Whitmore, waiving demand and notice."

46 DEFENDANT'S EXHIBIT No. 3.

$90 65 Value received I promise to pay Charles Danforth, or order, ninety dollars and interest, in three months from date.

G. S. MARSH,
Principal.

25

GARDINER, *July 6th*, 1855.

$158 N. M. WHITMORE,
Surety.

This note was paid by N. M. Whitmore when due.

G. S. M.

Endorsed: "Not holden. C. Danforth."

DEFENDANT'S EXHIBIT No. 4.

THOMAS C. WADLEY
vs.
GEORGE S. MARSH. } Execution.

Judgment rendered sup. jud. court, Ken. Co., Dec. 13th, 1855,

for debt	52 21
Cost	39 13
	91 34
	15

Dec. 21, 1855, (as appears by the endorsement,) this judgment and execution was assigned to Nathaniel Whitmore by Asa Gill, as attorney for Wadley.

DEFENDANT'S EXHIBIT No. 5.

AUGUSTA, *August 27th*, 1856.

GEO. S. MARSH, Esq.

DEAR SIR: Mr. Paine and myself think it will be best to sell those bonds amounting to $6,500, against the Ken. & P. Railroad Com-
47 pany, left by you with me for collection, as soon as we can; and we have fixed upon October 1st, 1856, at the Gardiner Hotel, in Gardiner, and ten of the clock in the forenoon, as the time and place for selling them at public auction. I want you to write me what notices you wish given of the sale.

Yours, truly,

N. M. WHITMORE.
H. W. PAINE.

Copy of letter sent by me to Geo. S. Marsh.

E. E.

DEFENDANT'S EXHIBIT No. 6.

CALAIS, *Sept.* 25, 1856.

N. M. WHITMORE, Esq., *Gardiner, Maine:*

DEAR SIR: I made my arrangements to go to Gardiner this week, but being afflicted with boils it renders it almost impossible for me to travel.

You, in your note by Mr. Edgerton, stated that you should sell the bonds the first of October. I hope that you will not sell them until I see you. I think I can arrange with you so as not to suffer too much. You are aware that I have lost already as much as any one ought to lose in one operation. If you will hold on a short time I will come and see you, and I have no doubt but we can arrange it better than to sell the bonds at this time. I have no doubt but they will be worth double they are at this time in less time than one year from this time. I want to come to the stockholders' meeting which will take place in October. If you will delay sale until that time, I will agree with you in some satisfactory manner.

Please let me hear from you by return mail.

Truly, yours,

G. S. MARSH.

48 DEFENDANT'S EXHIBIT No. 7.

CALAIS, *June* 30, 1856.

N. M. WHITMORE, Esq.:

Your last came to hand some days since. I should have answered it before if my health would permitted. I have been very ill for the last month past.

I will go to Gardiner as soon as I can leave my business, and my health will permit, and try and make some satisfactory arrangement with you. I did intend to have seen you before this, but unavoidable circumstances have prevented me from being able to do so. I was in hopes that the company would have paid these notes, but I suspect

that there is no hopes of their doing so at present. It seems hard to sell these bonds at half price; but when I see you, we will come to some conclusion as to what course is best to pursue.

Truly, yours,

G. S. MARSH.

DEFENDANT'S EXHIBIT No. 8.

GARDINER, *March 20th*, 1857.

COL. MARSH:

DEAR SIR: Our court has now been in session about three weeks, and we have reached those cases against you, and I have, with much trouble, succeeded in continuing them; but we had to take Stoddard's testimony.

I want you to let me know what you intend to do with them. As to those notes against you, they must be closed at once. I have been called upon for money and cannot collect it. Some months ago I understood you to say that you would pay or give additional security. But I have not received any. In your last letter you stated you would be here the first of March. It is now the 20th. Those bonds will be
49 sold April 4th, 1857, at ten o'clock a. m., at the Gardiner Hotel, Gardiner, without fail, unless you give additional security, or pay a portion of the notes.

Do not fail to attend to this matter immediately.

Yours, truly,

N. M. WHITMORE.

I must have at least $1,000 in money.

The above is a true copy of a letter sent by mail, this day, directed to George S. Marsh, esq., Calais, Me.

Attest: N. M. WHITMORE, 2d.

DEFENDANT'S EXHIBIT No. 9.

CALAIS, *June* 6, 1857.

N. M. WHITMORE, Esq.:

MY DEAR SIR: I received your last in relation to the bonds, and all I can say in the matter is that I want you to do whatever you think is to the interest of all concerned. I have not been able to go to Gardiner as I expected, but it is not for the want of intention to do so. If I could possibly leave, I would see you at once, but it is almost impossible for me to leave here at this time; but if my life is spared I will see you as soon as I can possibly make arrangements to leave here for a few days.

I have been very nearly as much disappointed in winding up my contract with Lewey's Island Road as I was with the Kennebec, therefore it makes me very low in funds, and I have to work very hard to get on at this time, but I am in hopes that I shall be able to realize something from the work that am doing at this time, but it is a very hard time to do business, everything is so very scarce and high. It is almost impossible to make work pay the expenses, but I am in hopes
50 things will change for the better. I wish that you would see the president of the Kennebec Road and tell him that I do think that they ought to pay me something on those notes, under all of the circumstances. Tell him if I was not poor I would not ask them, but necessity makes me make this request, and it does seem to me, in all honor, that they ought to pay these notes. I am now nego-

tiating for a large contract. If I succeed in getting it, I think that I shall be able to get along without much difficulty. The company is in funds and will pay all money for the work. I will write to you again next week and let you know how I prosper, and at what time I will see you.

You complained in your last of my not writing to you. I was not aware that I had neglected to answer all of your letters. Please write to me and not get out of patience, for I am trying to do all that is in my power, and I will do whatever I can for you.

I hope you will answer this by return mail.

Very respectfully, your ob't serv't,

G. S. MARSH.

51 Said cause was thence continued to this term, when the following decree was entered, viz:

MAINE DISTRICT, *ss:*

Circuit court U. S., September term, 1871, holden by adjournment Feb. 5, 1872.

GEORGE S. MARSH
v.
NATHANIEL M. WHITMORE. } In equity.

This cause came on for hearing before the honorable Edward Fox, district judge, upon the bill, pleadings, and proofs exhibited, and was fully heard and argued before him on the sixth day of November, A. D. eighteen hundred and seventy-one, on consideration whereof it is now ordered, adjudged, and decreed that said bill be dismissed with costs for the defendant, taxed at eighty-eight dollars and seventy-five cents.

Whereupon, to wit, on the seventh day of said February, said complainant claimed an appeal from the aforesaid decree to the Supreme Court of the United States, and on the fifteenth day of said February he filed the following bond, viz:

Know all men by these presents, that we, George P. Wescott, of
52 Portland, in the State of Maine, and Charles McCarthy, jr., of said Portland, are held and firmly bound unto Nathaniel M. Whitmore, of Gardiner, in the State of Maine, in the full and just sum of five hundred dollars to be paid to the said Whitmore, his certain attorney, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals, and dated the thirteenth day of February, in the year of our Lord one thousand eight hundred & seventy-two.

Whereas, lately, at a term of the circuit court of the United States held at Portland in and for the first circuit on the fifth day of January, 1872, in a suit in equity depending in said court between George S. Marsh, plaintiff in equity, and Nathaniel M. Whitmore, defendant, a decree was rendered against the said George S. Marsh, and the said Marsh having obtained an appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit,
53 and a citation directed to the said Whitmore citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Marsh shall prosecute his said appeal to effect, and answer all damages

and costs if he fail to make his plea good, then the above obligation to be null and void, otherwise to remain in full force and virtue.

GEO. P. WESCOTT. [L. S.]
CH'S McCARTY, JR. [L. S.]

Signed, sealed, & delivered in presence of—
S. C. STROUT.

Approved.

EDWARD FOX,
Dis. Judge of Maine.

And said bond having been duly approved, the aforesaid appeal was allowed.

Attest:

GEO. F. EMORY, *Clerk.*

Recorded from the original papers & minutes by Geo. F. Emory, clerk.

54 MAINE DISTRICT, *ss:* OFFICE OF THE CLERK OF THE CIRCUIT COURT U. S.

I, Geo. F. Emory, clerk of the circuit court of the United States for the district of Maine, hereby certify that the foregoing is a true and perfect copy of the record of a cause determined in said court wherein George S. Marsh was plaintiff in equity and Nathaniel M. Whitmore was defendant.

In testimony whereof I have *have* hereunto set my hand and affixed the seal of said court this twenty-eighth day of May, A. D. eighteen hundred and seventy-two.

[SEAL.] GEO. F. EMORY, *Clerk.*

55 The United States of America to Nathaniel M. Whitmore, of Gardiner, in the district of Maine, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, to shew cause, if any there be, why the decree should not be reversed, which was rendered by the circuit court of the United States for Maine district, on the fifth day of February, A. D. 1872, against George S. Marsh in the suit in equity wherein he was plaintiff and you were defendant, and from which he has appealed to the said Supreme Court.

Witness the honorable Edward Fox, a judge of the circuit court aforesaid, this fifteenth day of February, A. D. 1872.

[SEAL.] EDWARD FOX, *Judge.*

56 I hereby acknowlege service of the within precept, and in behalf of said Whitmore waive all further service thereof.

A. LIBBEY,
Def't's Solicitor.

(Indorsement on cover:) No. 327. George S. Marsh, appellant, vs. Nathaniel M. Whitmore. Maine C. C. U. S. Filed 5th December, 1872.

p. 22

Supreme Court of the United States

No. 327.

GEORGE S. MARSH, APPELLANT,

vs

NATHANIEL M. WHITMORE.

Appeal from the Circuit Court of the United States for the District of Maine.

BRIEF FOR THE DEFENDANT BY

ARTEMAS LIBBEY.

Supreme Court of the United States

No. 327.

GEORGE S. MARSH, APPELLANT,

vs

NATHANIEL M. WHITMORE.

Appeal from the Circuit Court of the United States for the District of Maine.

BRIEF FOR THE DEFENDANT

This is a bill in equity, in which the complainant seeks to redeem $6.500 of the bonds and $2.000 in the promissory notes of the Kennebec and Portland Railroad Company, alleged to have been pledged by complainant to defendant in 1855, as collateral security for the future services and advances of the defendant for the complainant in compromising the complainant's debts in the State of Maine.

For a full statement of the allegations in the bill, and the averments in the answer, I beg leave to refer to the opinion of Judge Fox, in the court below, a copy of which is herewith submitted.

The complainant's bill cannot be sustained, and the decree of the court below should be affirmed for the following reasons.

I. The bill is bad, as it does not aver a tender, nor contain a formal offer to pay whatever may be found due to defendant on a statement of the accounts between the parties. Story's Eq. Pl. § 187 Kennebec & Portland Railroad Co., *v* Portland & Kennebec R. R. Co., 54 Me., R. 173.

II. If complainant is entitled to a decree at all it must be on the case stated in his bill.

"No admission in an answer, can under any circumstances lay the foundation for relief under any specific head of equity, unless substantially set forth in the bill"—Jackson v Ashton, 11 Pet. 229, on page 249—

"A party is not allowed to state one case in a bill or answer, and make out a different one by proof; the *allegata* and *probata* must agree: the latter must support the former."

Boone v Chiles 10 Pet. 177 and cases cited on page 209.

The bill alleges in substance, that the bonds and notes were delivered to the defendant in 1855, as security for his future advances and services in compromising and settling the complainant's indebtedness in Maine.

This allegation is denied by defendant in his answer. See transcript, page 6. Complainant's evidence is that they were delivered to the defendant as security for about $3.000, which he had borrowed of him, and for which he had given him his notes on time. See deposition of complainant; answer to third interogatory, pages 13 and 14.

The written contract between the parties, dated July 13, 1855, is materially different from that set out in the bill, and the one testified to by complainant. See defendant's exhibit No. 1, page 22—

The contract set out in the bill is disproved, and complainant is not entitled to any decree to enforce it.

III. As to the cause of the action set forth in the bill in regard to the notes, the complainant has a clear and adequate remedy at law. Equity will not relieve him.

On the facts of the case the defendant is not liable. The notes were not received by defendant under the same contract as the bonds. See contract of July 13, '55, page 22. They were received by defendant, one in February, 1856, and the other in the fall of the same year, with directions if he could collect anything thereon, to apply it on complainant's notes, and to hold as additional security for his indebtedness. Defendant's answer, pages 8 and 9. There was no negligence on the part of defendant in not collecting the notes. See defendant's answer, page 8. Letters, complainant to defendant of June 30, '56, page 24, same to same, June 6, '57, page 25, defendant to complainant, March 20, '56. Deposition of James W. Bradbury, page 19.

IV. The sale of the bonds by defendant at public sale was authorized. He had repeatedly demanded payment of his notes. Had given due notice of the time and place of sale, and complainant had directed him to, "do whatever you think is to the interest of all concerned." See letter of complainant to defendant of June 6, 1857, page 25.

The sale was for the full value of the bonds, and at a time when they were depreciating in the market. It was free from actual fraud.

Assuming that defendant could not legally purchase, his purchase was not void, but voidable by the pledger only. It is at his option to set aside the sale, or ratify it after a full knowledge of the facts. Hill on Trustees, 248 and note, 4th Am. Ed.

Story's Eq. Jur. § 322.

The complainant could ratify the sale in two ways.

1. By his acquiescence or laches till his claim was barred by limitation.

2. By express agreement.

This bill must fail on either ground. The sale was in June, 1857, and the bill was filed in court, in March 1869, after a lapse of nearly twelve years. The sale was public and the complainant had full opportunity to ascertain the price for which the bonds were sold, and who were the purchasers. "And the possession of such means of knowledge is, in equity, the same as knowledge itself."

New Albany v Burke, 11 Wal. 107.

If complainant seeks to avoid the effects of his laches he should set fourth in his bill specifically, what were the impediments to an earlier prosecution of his claims; how he came to be so long ignorant of his rights, and the means used by defendant to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill.

Stearns v Page, 7 How. 819.

Badger v Badger, 2 Cliff., 154. Same case, 2 Wal. 87.

The only allegation in complainant's bill on this point are the following. "And your orator further shows unto your honor that the said Whitmore, as well before as after said sale, pretended and represented to your orator * * * * that the sale of said bonds as aforesaid was a bona-fide sale, after due and sufficient notice and advertisement thereof; that said bonds brought all they were fairly worth in the market; that the purchaser was a bona-fide purchaser at said sale." See clause 6 of bill.

"And your orator further says that he did not, until lately, by reasons of the fraudulent concealments of said Whitmore in the premises, came to a knowledge of the several matters and things whereof it is herein alleged that your orator was ignorant, touching the fraudulent conduct and practices of said Whitmore, and that he was wholly ignorant of his rights in this regard or that he could have redress in law or in equity by reason of the premises, and remained so till he had consulted counsel and been advised by persons learned in the law, just previous to filing this his bill of complaint." See clause 8.

These allegations are vague and uncertain, and entirely insufficient to let in proof of fraudulent concealment.

But, if the allegations of the bill on this point are sufficient, they are not proved. They are denied by defendant in his answer and he avers that he sent the complainant the auctioneer's account of the sale, containing the names of the purchasers and the prices paid, which the complainant, at an interview in Augusta, in 1858, admitted to him he received, and that he then said to defendant, he did not think the bonds worth so much as they sold for, and defendant, must keep them. Transcript, pages 7, 8 and 9.

These averments are directly responsive to the allegations in the bill, of fraudulent concealment of the facts by defendant, and that they did not come to the knowledge of complainant till just previous to filing his bill. They must be taken as true unless overcome by complainant by evidence equal to the testimony of two witnesses. The only evidence offered by complainant to disprove these averments in the answer, is his own deposition. On this point, in answer to the 10th interogatory, he says "I first knew of the bonds being bid in by defendant in 1869. I had a conversation with him a few years prior, and he said he had no interest in the bonds; that it was a bona-fide sale." In answer to the 7th cross interogatory, "state whether the defendant met you in the Court-House in Augusta, in 1858, and explained to you the sale of the bonds, and the situation of the notes and what you said to him if any thing;" he answers: "I have some faint recollections of meeting him some time, but can't say when or where; the substance of the conversation I can't recollct."

Now when we consider the many discrepancies between the allegations in the bill and the complainant's evidence; that the material allegations in his bill, sworn to by him, are proved to be untrue by the documentary evidence in the case; that his evidence was given with full knowledge of the averments in the answer, and he does not deny receiving the auctioneer's account of sale, nor the interview and conversation in 1858, particularly set forth in the answer; that at that time and down to 1861, the bonds were worth about half as much as they sold for, so that it was then the interest of complainant not to redeem, but the interest of defendant to have them redeemed; that, though urged to settle and to pay, or secure the balance due, he made no effort to do so, till after the notes were barred by limitation; that he alleges in his bill that the bonds and notes were all the while worth par, but testifies that he had no means of knowing the value of the bonds after pledged, except as reported by defendant, and in his letter to defendant of June 6, '56, treats the notes as uncollectable, unless the Railroad Company could be pursuaded to pay something—that he held some of the same class of bonds till 1863, when he sold them at thirty per cent flat; can there be any doubt of the truth of the averments in the answer? and that complainant, with full knowledge of the facts, acquiesced in, and by his silence till after a foreclosure of the mortgage securing the bonds, the organization of a new corporation, the convertion of the bonds into stock, and its great appreciation in value under the new management, ratified the purchase by defendant?

If necessary, I think we might go further and successfully maintain, upon the evidence in the case, that complainant expressly ratified the sale and purchase of the bonds by defendant.

ARTEMAS LIBBEY,

Defendant's Solicitor.

Supreme Court, . . . December Term, 1872.

GEORGE S. MARSH, *Appl't, vs.* NATHANIEL M. WHITMORE.

PLAINTIFF'S BRIEF.

THIS is a Bill in Equity, asking to be let in to redeem bonds to the amount of $6500, for an account of two notes of $1000 each, pledged upon the same terms as the bonds, and for general relief. The defendant filed an answer which is put in issue by a general replication.

The case comes here by appeal from the decree of the Circuit Court dismissing the bill.

1. Were the notes held upon the same trusts as the bonds under the contract of bailment, and is the defendant liable to account for them?

The bill alleges and the answer admits they are so held. Notes may be pledged like other personal property. By R. S. of Maine, ch. 76, sects. 18, 19, 20, stockholders were made liable for the debts of the corporation, and these stockholders were fully able to pay them, as fully appears by want of denial in the answer and by defendant's proof. In his character of attorney, as well as trustee, he was bound to collect, and, having failed to do so, he has rendered himself chargeable for the amount of them. It is no excuse, if true, that he was ignorant of the law as to the liabilities of the stockholders of this corporation, as settled by this Court. The case finds an action still pending on these notes, in the defendant's name, and, so far as concerns them, the trust is unsettled. *Bulkley* v. *Wilford*, 2 Clarke & Finn, 177; Perry on Trusts; *Barrows* v. *Rhinelander*, 3 J. C. R., 614; *Hathorn* v. *Calef*, 2 Wall, 10; *Garlick* v. *James*, 12 Johns., 146; *Atwood* v. ———, 1 Russell's Rep., 353.

2. Was the defendant authorized by the contract of bailment to sell the bonds?

This contract is in writing and the rights and liabilities of the parties are to be determined by this Court. The plain-

tiff says in his bill, that the agreement and understanding was that the defendant was not to be at liberty to sell, and that the sale was in violation of his duty and trust. By his answer the defendant denies this interpretation, and this Court are to look into this contract and determine which is right. It was prepared by the defendant and in terms gives him no such authority, nor does it contain words of forfeiture in case of non-payment on the day, and it is well settled that non-compliance on the day gives no additional power to the pledgee, as in case of forfeiture under a mortgage. The legal title always remains in the pledgor until he is legally foreclosed. This contract is to be interpreted in view of the facts and circumstances surrounding the parties at the time. These bonds were then undoubted security, and, even after the alleged failure of the corporation, the defendant wrote the plaintiff that they were selling at 65 per cent., which, with the accrued interest, would much more than have paid the debt for which they were pledged. This road was 70 miles in length, passing through the centre of the State, with interest bearing liabilities to the amount of $1,200,000, only prior to these bonds. The defendant's security would in no way be enhanced by a sale, if all he sought was a just return of his money and interest. He was a Director of the road and in a position to know, and did know their real value, and, unless he sought to get some undue advantage in a panic, there could be no motive in providing for a sale. Under the circumstances, I think a fair interpretation is that the right to sell was not intended to be conferred. If this is so, a change of circumstances cannot affect our rights. *Brownell* v. *Hawkins*, 4 Barb., 491; *Allen* v. *Dykers*. 3 Hill, 593; *Cortelyon* v. *Lansing*, 2 N. Y. Cases in Error, 200; *Soutter* v. *Porter*, 27 Maine, 417; *Doane* v. *Russell*, 3 Gray, 382.

3. Is a valid and *bona fide* sale, if authorized, made out by admissible and competent evidence? Upon whom is the burden of proof?

The defendant, by his answer, sets up a title in himself acquired *in invitum*, and the burden is on him to make everything appear necessary to establish a valid sale of a

pledge. We set out a sale made in violation of his trusts, without notice or sufficient advertisement, fraudulent and void. It is not enough for the defendant in his answer to simply negative these averments. His answer, even if responsive and so evidence, must show every fact requisite to vest in him at least a formal title. A fraudulent sale, or one without notice, or without sufficient advertisement is no sale, and the question as to whether it is void or voidable, or whether there has been ratification, does not arise. Whether a sale is valid, is a question of law to be determined by the Court, when the party upon whom is the burden makes all the facts relied upon appear. The defendant must show demand of payment, produce notice and advertisement, and show service and publication so the Court may see that they are sufficient in form and substance and as to time to authorize a sale. The answer is clearly in avoidance, and the case is barren of admissible evidence to make out a sale that can give even a semblance of title. Copies of papers without proof of loss of the originals, or that they are copies, and without proof that they are true copies of the originals, or that the originals were ever sent, when it appears that it is accessible to the defendant, are not evidence, nor are the alleged declarations of the defendant to Col. Marsh, evidence. There is then no proper evidence that Col. M. had notice of the sale, and especially none of the sale alleged to have taken place June 23d. The last letter conveying notice to him gives April 4th as the day, and there is no evidence that he had notice of any postponement. The statement that he advertised in the Gardiner Transcript, is not evidence. To make it evidence he should have filed the papers and proved a publication, or done what was equivalent. In undertaking to file exhibits as proof, he understood the burden was on him; has assumed it, and having undertaken to answer must do so fully and particularly. *Farnum* v. *Brooks*, 9 Pick., 250; *Clements* v. *Moore*, 6 Wall, 299; *Hart* v. *TenEyck*, 2 J. C. R., 69; *Cortelyon* v. *Lansing*; *Deering* v. *Smith*, 3 J. C. R., 343; *Storer* v. *Little*, 41 Maine, 69; *Harrison* v. *Guest*, 35 Eng. L. & Eq. R., 487, 493;

Hare & Wall, L. C. in Eq., p. 125 and notes; *Taylor* v. *Milner*, 11 Ves., jr., 41; *Hutchins* v. *Chadbourn*, 35 Maine, 189; *Parker* v. *Voye*, 45 Maine, 54; *Boynton* v. *Bragstow*, 53 Maine, 362. Gaither v Clarke 7 Johns 218

4. Is the answer responsive and so evidence for the defendant? and, if evidence, is it sufficient to discharge him? The bill alleges a bailment. The answer admits it. We also allege a sale of the pledge under circumstances which make it utterly void. We allege that the bonds were bid in at the defendant's request and for him; that nothing was paid for them; that there was no delivery, and that he caused the sale to be so made for the fraudulent purpose of extinguishing the plaintiff's right to redeem, and so acquire a title for less than their actual value; that he agreed with the plaintiff at the time of bailment to return so much of the pledge as was not necessary for his indemnity; that he represented to the plaintiff after the sale, and that the plaintiff believed the representation to be true, that the purchaser, at the sale, was a *bona fide* purchaser. None of these allegations are in terms denied. Nor does the defendant deny the ability as well as the liability of the stockholders to pay the notes, nor does he put in issue the allegation in the bill, that the plaintiff was ignorant of his rights up to the time of the commencement of this suit. His failure to put directly in issue these vital allegations can have but one construction. It is not alleged in the bill that he did not send to Col. Marsh the names of the purchasers at that sale and the prices paid, and his answer is not responsive to any allegation in the bill, and is not evidence. The averment that he told Col. M. that he was not the owner of the bonds but would procure them if he would pay, is not responsive, and not evidence for him, and the same is true as to the allegation in his answer that the plaintiff gave him the notes. The answer, to be evidence, must state facts distinctly and unequivocally, and not conclusions of law; if ambiguous or doubtful, they must be construed most strongly against the defendants. The answer, too, in substance, admits the allegation in the bill that he acquired a title to the bonds for less than

their real value. *Union M. Ins. Co.* v. *Com. M. M. Ins. Co.*, 2 Curtis, 524; *Sargent* v. *Larned*, 2 Curtis, 347; *Callan* v. *Statham*, 23 How., 277; Daniel Ch. Pl. & Pr., 744, (n.); Story's Eq. Pl., sect. 582; *Hart* v. *TenEyck*; 2 Story's Eq., Jur., § 1529; *Awdley* v. *Awdley*, 2 Vern., 193.

5. Is the sale void? or, if sufficient, except for the reason only that the defendant was the purchaser at the sale, has the plaintiff ratified the sale? The defendant relies upon what is set out in his answer to show ratification. If a sale in all respects sufficient, except only that the defendant, through his friends, purchased the bonds, is not made out, then neither the question of ratification or laches arises in this case. The allegations in the answer are not evidence. Being in avoidance, the burden is on the defendant to divest himself of the trust which his answer admits, and this he has not done. If sufficient is not set out and proved to make out a good sale, or, if fraudulent, and therefore totally void, the parties sustain the same relation to each other as if it had never taken place; a void sale is no sale and there is nothing to ratify. But if ratification is necessary, the burden is on the defendant, by admissible evidence, to show every fact and circumstance necessary in law to constitute a valid ratification. The alleged one is not responsive and evidence, nor does it appear that he communicated to the plaintiff everything material for him to know, and especially it does not appear that he communicated the vital fact, that the sale was void or voidable, without such ratification, and without this knowledge the plaintiff could not act understandingly. No express ratification is pretended, and the case is barren of evidence from which the Court can imply one. The defendant nowhere says he communicated to the plaintiff, after the sale, that the bonds were bought in for him, and admits that he did tell him that he was not the owner. He says in the answer, that his brothers were the owners and the list sent to Col. M., if any, undoubtedly set them and Lewis & Chadwick out as the purchasers. It is only when a purchase is made by a trustee openly, that a *cestui que trust* is required to avoid it. But if voidable only, and a

Coal & Iron Co. v. Sherman
Am. Law Reg. April 1860
p. 352

disaffirmance is necessary, then we say, the demand for an account in this case and the commencement of this suit, is a sufficient and seasonable disaffirmance. *Middlesex Bank* v. *Minot*, 4 Met., 324; *Mochoud* v. *Girod*, 4 How., 561; Bouvier, L. D., "ratification," §§ 1, 6, "void," § 7 "fraud," § 2; 2 Ball & Beat., 137, 319, 477; *Roche* v. *OBrien*, 1 Ball & B., 337.

6. Is the sale fraudulent?

The defendant has always claimed, and by his answer claims a valid title to the pledge by virtue of this sale, and such a claim, when set up on insufficient grounds, has been held a breach of trust and a legal fraud, and the pledgee has sometimes been held to forfeit his lien. Many things appear in this case which the law regards *indicia* of fraud, and when unexplained, as very strong evidence of it.

The plaintiff was a non-resident, living at the time of this bailment in N. B., and since in Maryland. For his knowledge in relation to these securities he relied solely upon his attorney, this defendant. After the company had failed, as Mr. Bradbury says, the bonds dishonored, and as low as was supposed possible under the circumstances, the defendant wrote Col. M. that they were selling at 65 p. c., which, with their accrued interest, would much more than have paid the debt. It does not appear that the defendant ever communicated any decline from this price to the plaintiff till after the sale, as he should have done, knowing, as he did, the confidence the plaintiff was reposing in him. Col. M., too, undoubtedly regarded these as threats that the defendant would sell, rather than notices of a sale really to be made, and his letters show that he did so regard them, for, to the last, he is talking of providing means to pay. The fact that the purchase was made for the defendant in the name of his brothers, and Lewis and Chadwick, is evidence of concealment, and he has not undertaken to raise this cloud, though all competent witnesses. He says in his answer, that his brothers were the owners, but when he finds they are to be made parties defendant, he, for the first time, admits his own ownership. The bill alleges that he made this sale in order to get them for less than their real value, and his answer ad-

mits that in fact he did get them for very much less. As a director of the road he knew very well that they were really worth par, and that ultimately their market value would be that. The non-production of the letter, or at least a copy, which he says he sent Col. M., giving names of purchasers, &c., is suspicious, seeing he produces others of less moment. He not only does not say in his answer that he told Col. M. he was the purchaser, but does say his brothers were the owners, and he unquestionably communicated their names, if any, as the purchasers, and represented them, and Lewis and Chadwick as the persons who paid the prices named for them, and this was a false representation. If he leaves the matter in doubt as to what names he did send, the Court will give an interpretation to his answer most unfavorable to him. Putting the stock into which these bonds were converted in his brothers' names, is evidence of continued concealment. It is not to be supposed that he informed Col. M. that he was the purchaser at the sale, and the real owner of these bonds, when, by his very answer in this case, he is seeking to make out a title to them founded on that sale. The bill alleges that the purchase at the sale was made at his request and for him, that the purchaser was present at his procurement, and that no delivery was made or money paid so that the bonds were never out of his hands at all, and all parties are competent witnesses to show if this was not so, and his failure to deny and to call witnesses to disprove it, is satisfactory evidence that it was true. He was a director and knew these bonds were worth par, having interest liabilities before them to the amount only of $1,200,000 on a road worth never less than $2,500,000. The plaintiff was away, and had no definite knowledge of the facts relying upon the defendant for his information, the defendant was in a position to get an undue advantage over him, and did so. Again, the defendant nowhere accounts for the interest on these bonds paid him Oct. 15, 1855, which shows concealment. The sale of these public securities, at a country hotel, is a practical fraud, and should never be upheld. Such securities only have marketable value in commercial towns. The plaintiff was,

as it appears, in embarrassed circumstances at the time, and quite in the power of the defendant, as he well knew. He allowed the unjust judgment to go against Col. M. in favor of Stoddard & Williston, in order to keep him at a distance, and from calling in question his acts. Why did he not collect the notes of the stockholders, after this Court held them liable? *Mochoud* v. *Girod*, 4 How., 561; *Hanley* v. *Sprague*, 20 Maine, 431; 1 Dev., 306; *Prentiss* v. *Russ*, 16 Maine, 32; *Oliver* v. *Piatt*, 3 How., 333; *Ingersoll* v. *Barker*, 21 Maine, 474; *Harding* v. *Randall*, 15 Maine, 335; *Woodhouse* v. *Woodhouse*, Law Rep., 8, Eq. 514; *Brettlebench* v. *Goodwin*, Law Rep. 5, Eq. 445; *Williams* v. *Stevens*, 12 Jur., 952; *Bowen* v. *Evens*, 3 H. L. Cas., 607; Hare & Wall, Lead. Ca. in Eq. pp. 152, 159, 168, 169; *Lechmere* v. *Carlisle*, 3 P. Wm., 215, 222.

7. Is the statute well pleaded? and if so, is the plaintiff barred by lapse of time?

The object of pleading is certainty, and, if he will avail himself of laches in his answer, he should have set it out as a distinct ground of defence, showing what and wherein, and not having done so, the defence is not open to him.

It is well settled that the statute does not run against a pledgor, especially not where a part of the pledge is yet in hand, as the defendant confesses these notes are now in suit, and are collectable of the stockholders. At any rate he has shown as much laches in collecting them as we in pursuing our rights against him. If no legal sale is shown or legal ratification, the question of laches does not arise in the case if well pleaded. The plaintiff is not required to disaffirm a sale that has no legal validity, and cannot be guilty of laches in not doing so, nor is he required to disaffirm till he has knowledge of the facts that go to make it void. It was not necessary for the plaintiff to allege and prove fraudulent concealment on the part of the defendant, to take the case out of the statute if there was a fraudulent and void sale, or a voidable sale, and no sufficient evidence of ratification since the statute does not apply to pledges at all. The fact that he alleges concealment does not make it necessary for

him to prove it, since the parties hold the same relation to each other as if it had never taken place. If otherwise, however, the defendant's undertaking to, and failure to answer fully, shows concealment and fraud as before stated. If the defendant's answer show a *bona fide* sale, good in all respects to foreclose the plaintiff, except only that he was the purchaser through his friends, and also show a full communication to the plaintiff of all the facts by which he could avoid it, and the plaintiff thereupon had slept upon his rights for an unreasonable time, say for twenty years, and the bonds had passed into other hands, so that injustice would be done by disturbing the transaction, he would show a case within the range of the authorities, but I know of no case where a pledgor has been barred by eleven year's acquiescence where the property was all in the hands of the pledgee or under his control, and where no injustice could be done by opening the accounts, and where a part of the pledged property was in litigation, as the notes are, where the statute has been successfully pleaded, and a title confirmed in the pledgee under like circumstances.

Courts of Equity follow the law by analogy, it is said, but this sword cuts the wrong way in this case, since at law pledges are outside of the statutes, and so by analogy it can not be invoked at all in this case. The facts here show a very different case from the one supposed. Here is not only a *suppressio veri* but *suggestio falsi*, absolute misrepresentation, as satisfactorily appears in the case. But if the plaintiff is required to allege in his bill, and show when and how he came by his information, then we say the allegations in the bill are sufficient to bring the case within the saving provisions of chapter 81, section 107 of the R. S. of Maine, where the contract was made. Nor does this principle apply where the defendant has undertaken to answer and convicts himself, upon his own showing, or has answered insufficiently, nor to bills like this, in the nature of bills of discovery, where it is so apparent that the plaintiff first came to a knowledge of the real character of that sale by the defend-

ant's answer. The plaintiff never knew that the defendant was the real owner until his answer and agreement admitted it. It is *res adjudicata* in this Court. It is only *bona fide* purchasers without fraud, that can set up so slight laches, if any, as appears in this case. Nor is breach of trust within the statute. *Coster* v. *Murray*, 59, C. R., 531; *Russell* v. *Southard*, 19 Curtis, 75; Story on Bail., § 346; *Hanley* v. *Sprague*, 20 Maine, 431; *Mochoud* v. *Girod*, 4 How., 561; *Awdley* v. *Awdley*, 2 Vern., 193; Perry on Trusts, § 229; *Woodhouse* v. *Woodhouse*; *Brattlebank* v. *Goodwin*, Hare & Wall, L. C. in Eq., 168.

Goodrich v. Pendleton 3 J. C. R. 394

8. But if the Court take a different view, still we are entitled to redeem upon well established principles of law. At the alleged Augusta interview, the defendant in his answer says distinctly, that he told Col. Marsh that he was not the owner of these bonds, and it is not for him now to say that that statement is not true. If true, he came to his title to them from Lewis & Chadwick and his brothers after the alleged ratification, whereby he avers this otherwise void sale became valid. It is well settled that a mortgagee or pledgee coming again to the estate, takes it subject to the original trusts, and the pledgor is again let in to redeem. The plaintiff can only redeem in this case by payment of debt and interest, — injustice will be done to no one. *Holridge* v. *Gillespie*, 2 J. C. R., 33; *Keech* v. *Sanford*, 3 Eq. Ca. Abr., 741; *Cook* v. *Sadler*, 2 Vern., 235; *Bovey* v. *Smith*, 1 Vern., 61; *Mochoud* v. *Girod*, 4 How., 561; 19 Curtis, 75; *Bowen* v. *Evans*, House of Lord's Cas., 257, 282; *Keech* v. *Sanford*, 1 Hare & Wall, L. Cas. in Equity, 32; Story's Eq. Jur., sec. 1264.

Story 2 R. § 51

9. STATEMENT OF ACCOUNT.

Amount of bonds pledged, and coupon interest converted into stock, May 20th, 1862,	$9,900 00	
Stock and cash dividend, paid on same to same date, 1868	5,940 00	
	15,840 00	
Notes pledged, and interest to same date,	4,036 00	
Total,		19,876 00
Contra:		
Notes and account secured in full, and interest to same date,		7,678 00
Excess of bonds over debt secured,		8,162 00
Excess of bonds and notes pledged over debt secured,		12,198 00
Excess of bonds at 75 p. c. over entire debt	4,202 00	
Add notes pledged,	4,036 00	
		$ 8,238 00

Not only does the defendant hold the bonds and notes, but the balance of his notes and account not paid by the sale of the bonds which he is seeking to collect of the plaintiff, (3874 — 1305 = $2569,) with interest.

Do not these facts show an unconscientious advantage that ought not to be retained? Ought a trustee to be thus allowed to speculate out of the trust estate? Will injustice be done by declaring him still trustee? Can a case be found in the annals of equity jurisprudence, where a pledgee, as in this case, confesses in his answer that he still holds the pledge, and that its cash value is by many thousand dollars greater than the debt, where relief has been denied? For the same reasons this Court felt constrained to grant relief in *Mochoud* v. *Girod*, and *Southard* v. *Russell*, can you withhold it here? *Wedderburn* v. *Wedderburn*, 2 Eng. C. L. & Ch. R., 52; *Cutts* v. *Salmon*, 12 Eng. L. & Eq. R., 316; *Brookshank* v. *Smith*, 2 Younge & Coll, 58, 68; *Att'y Gen'l* v. ——— *Co.*, 5 Mylne & Cr., 16, 17; *Hough* v. *Richardson*, 3 Story, 659; 2 Story Eq. Jur., §§ 15, 20, (a); *Vernon* v. *Stevens*, 2 Peere Wms., 67; *Hampton* v. *Spencer*, 2 Vern., 258.

A. G. Sharkey

DISTRICT OF MAINE.

UNITED STATES CIRCUIT COURT.

GEORGE S. MARSH, IN EQ.

VS.

NATHANIEL M. WHITMORE.

OPINION OF THE COURT.

FOX, JUSTICE.



CIRCUIT COURT, MAINE DISTRICT, SEPT. T., 1871.

GEORGE S. MARSH, IN EQUITY.

vs.

N. M. WHITMORE.

Fox, J.

The rule being well established in equity that all the allegations of the answer which are responsive to the bill, shall be taken as true, unless they are disproved by evidence of greater weight than the testimony of a single witness, it becomes important to compare the bill and answer to ascertain how far the latter is to be deemed evidence in the case, as the only evidence produced by the complainant in support of his bill is his own testimony and some few exhibits, which are not very material.

The bill was filed March 12, 1869, and charges that in 1855 the complainant owned $6500 of bonds of the Kennebec and Portland Railroad, issued in October 1852, and $2000 of notes of said corporation, that being indebted to certain parties in the State of Maine, he retained the defendant, a counsellor at law, as his counsel and attorney to effect a compromise with his creditors, the defendant agreeing to advance money for that purpose if the complainant would entrust and deliver to him the bonds and notes as security and indemnity for his advances and a fair and reasonable compensation for his services; that confiding in the respondent as his counsel and agent he delivered to him the bonds and notes, who received the same upon the trust aforesaid and agreed not to sell or dispose of said securities without complainant's consent, and not to claim or demand thereof more than was fair and sufficient to fully indemnify him for his advances and services, and when indemnified, to return to complainant on demand so much and such parts thereof as were not necessary to indemnify him; that at the time the securities were delivered to Whitmore complainant instructed him to sue the notes and attach certain personal property of the corporation pointed out by complainant, and if not thus paid to collect the same from

the stockholders who were personally liable, and that Whitmore agreed to attend diligently to the collection of the same. The bill further charges as follows:

"That on or about the first day of October, A. D. 1856, at said Gardiner, your orator not consenting thereto, the said Whitmore, in violation of said trust and of his duty as counsel, attorney and agent of your orator as aforesaid, caused said bonds to be sold at auction.

"And your orator further shows unto your Honors that the said Whitmore, as well before as after said sale, pretended and represented to your orator that he had expended large sums of money and incurred great expense for and on account of your orator in the premises, and that his said advances and services, together with the amount due and owing him for his said advances to your orator, greatly exceeded the fair value of said securities entrusted to him as aforesaid; that the sale of said bonds as aforesaid was a bonafide sale after due and sufficient notice and advertisement thereof; that said bonds brought all they were fairly worth in the market; that the purchaser was a bonafide purchaser thereof at said sale; that said notes were of no value and were not collectable of said company or of the stockholders of said company, and that your orator was largely indebted to him for his said advances and services after he had fairly and faithfully realized out of said securities so entrusted to him, all they were fairly worth; and your orator confiding in him as his counsel, attorney and agent as aforesaid, believed such representations to be true.

"And your orator is now informed and believes and charges that the amount due and owing the said Whitmore by your orator, for his said advances to your orator, and on his account and for services rendered as aforesaid, was the sum of twenty-five hundred dollars or thereabouts, and no more; that the representation of the said Whitmore that there was due him from your orator, a much larger sum than said securities were fairly worth, or than could be fairly realized therefrom, were and are untrue; that the sale of said bonds as aforesaid was not a bonafide sale upon due notice and sufficient advertisement thereof; that Robert Thompson, who attended said sale and became the purchaser of said bonds, did so by the procurement of said Whitmore; that said Thompson bid in said bonds not for himself or on his own account, but for and on account of said Whitmore, and for much less than the real value therefor, viz.: for and at the rate of five cents on a dollar or thereabouts, as your orator is informed and believes; that the said bonds were never delivered to the said Thompson after said

pretended sale, and he paid nothing therefor; that said bonds were at the time of the sale and representations aforesaid, as the said Whitmore well knew, of the fair value of sixty-five hundred dollars or thereabouts, and said sale was so made in order to deceive, defraud and injure your orator in the premises, and for the purpose of defeating and extinguishing said trust and your orator's right to reclaim and redeem said securities, and that said Whitmore might obtain the title to the same for much less than the real value thereof; that said notes were at the time they were received by said Whitmore and long afterwards collectable of said company and of the stockholders of said company, as the said Whitmore well knew;"

And that if said notes had not been collected by said Whitmore the failure to collect them is attributable solely to his gross neglect, by reason whereof he has become and is justly chargeable with the full amount of said notes and interest thereon. The complainant further alleges that he did not, until lately, by reason of the fraudulent concealments of said Whitmore in the premises, come to a knowledge of the matters and things alleged, that he was ignorant touching the fraudulent conduct and practices of said Whitmore, and that he was wholly ignorant of his rights in this regard, or that he could have redress at law or in equity touching the premises, and remained so till he had consulted counsel and been advised just previous to filing this bill of complaint; that within two years he had demanded of said Whitmore an account of said trust property and of the amount received by him on account of the same which he unreasonably neglected and refused to render.

The bill then prays that he may be required to make full, true and direct answer to all and singular the matters therein before stated and charged, and also to the several interrogatories thereunder written, and that he may be required to account, &c., and surrender the stock received by him in exchange for said bonds, or pay the value thereof in money, &c.

The second specific interrogatory contained in the bill is:

"Whether you caused said bonds or notes to be sold at auction about October 1st, 1856, and what advertisement of such sale you gave. Whether they were bid in by one Robert Thompson, and if so, whether he purchased for himself and on his own account, or for you and your account. Whether you delivered the same to him after said sale, and at what price were they struck off to him; if not bid in by said Thompson, then by whom and for how much?"

And the fifth is:

"Whether you represented to the plaintiff after the sale of said bonds, that you had made such sale at public auction after duly advertising the same, and such sale was bonafide."

The respondent in his answer admits he was an attorney at law, but denies that he was ever employed by the complainant as his attorney or agent, or in any capacity to adjust and compromise his liabilities with his creditors, and avers that he never undertook to effect such a compromise, or to advance money for that purpose, and that the bonds and notes mentioned in the bill were not entrusted to him for any such purpose as is alleged in the bill; but that it is true, that on July 13, 1855, he did receive of the complainant $6500 of the bonds to secure H. W. Paine and himself against any and all liabilities which they or either of them had or might incur for or on account of said complainant, and especially to secure the payment of three notes of that date, given by complainant to respondent, and amounting to $3,481.57, and also to secure the payment of a note of $90 given by complainant to C. Danforth on which said Whitmore was surety. The answer further states that complainant never paid either of said notes, although repeatedly urged so to do, and that Aug. 27, 1856, he and Paine notified complainant that the bonds would be sold at auction Oct. 1, 1856, at Gardiner, if the notes were not paid, but at the earnest solicitation of complainant and his promise that he would soon adjust the whole matter, the sale was waived; that complainant paid no further attention to the matter, and on March 20, 1857, defendant notified him he should sell the bonds on the 4th of April, but hoping that the matter might be adjusted the sale was again waived till May 26th, 1857, when he advertised the bonds for sale June 20th, 1857, at ten o'clock, at the Gardiner Hotel, and notified the complainant in writing of the time and place of sale, and the complainant replied in writing "that the defendant must do with said bonds what he thought was best for all concerned," and he fully believed it was best then to sell the same: that notice of the sale was published three weeks successively in the "Saturday Evening Transcript," a paper published in Gardiner; that he sold $4500 of said bonds at auction at the time and place appointed for $950, when the sale was adjourned by the auctioneer to the 23rd day of said June, at the same place, when the balance of said bonds, being $2000, were sold at auction for $410.

"Five hundred dollars of said bonds were purchased by E. A. Chadwick for $100.50, and 1,000 by W. L. Lewis for $204. The balance was purchased by the defendant, and immediately

after said sale, he sent said Marsh the auctioneer's account of the sale, containing the names of the purchasers and the prices paid;—and endorsed the procceds of said sale on the said notes of the complainant. The defendant afterwards bought of said Chadwick and Lewis the bonds purchased by them, at the same prices they were sold for. And he says that the prices for which said bonds sold were the full and fair value of said bonds at that time, and more than he could get offered him at private sales on enquiry for a purchaser. That after that, in 1858 and 1859, said bonds of said railroad depreciated in value so that they sold in the market at ten dollars on the hundred and thereabouts. He further says, that in 1858 he sought an interview with the complainant at Augusta in this State, for the purpose of trying to get a full settlement of his matters with him, and the complainant then stated to him that he received the account of the sales sent him by deft. He then represented to the complainant that there was considerable due him over and above the proceeds of said bonds, and his securities, and urged him to pay, saying to him that though he was not the owner of the bonds, he could get them and would do so, and give up all if he would pay, but the complainant answered, in substance, that he did not think the bonds worth so much as they sold for, that I must keep what I had got, and if he ever got able he would pay the balance.

"And the said defendant further avers that he was never guilty of any fraudulent practices towards the complainant in any way, nor did he in any way conceal any facts in regard to the premises from the complainant, but on the contrary thereof, the sale of said bonds was fair, in good faith, after due notice, made for the purpose of realizing the most possible for the complainant from the same, and when they were depreciating in the market, and continued to do so for some years after, till they were worth but half as much as they were sold for at the sale, that all the facts were fully stated to the complainant and he fully approved and ratified the proceedings in regard to the sale of said bonds. And he submits that if he had not so ratified and approved said proceedings, he has been guilty of such laches, after having a full knowledge of the facts, that he is not entitled to the relief prayed for in his bill of complaint."

To the second interrogatory propounded to him he makes answer, "He did cause the bonds to be advertised and sold, as is fully set forth in the answer * * * the complainant was personally notified as early as the first day of June, 1857, or

thereabouts, of the time and place of sale. Robert Thompson was not the purchaser of any of the bonds. The names of the purchasers and the prices for which they sold are hereinbefore fully specified."

The main groundwork of the bill is an alleged sale of these bonds by the respondent in violation of his duty as Trustee and a purchase of them by himself, through the intervention of one Thompson, in fraud of complainant's rights, of which acts of the respondent the complainant avers he had no knowledge by reason of the fraudulent concealment of Whitmore till a short time before the suit was instituted. These matters are charged with fullness and particularity, and the respondent is called upon to make full, true and direct answer thereto. In his answer the respondent denies that any fraudulent practices were committed by him in the sale, but states that the sale was at public auction after due notice to complainant, that the larger portion of the bonds were bid in by the respondent and the balance by Chadwick & Lewis, from whom the respondent purchased them at the prices they were sold for at the auction; that the full cash value of the bonds was then realized, viz.: about 20 per cent, and that in a year they fell to 10 per cent. To that portion of the bill which alleges complainant had no notice of the sale, and that respondent was the purchaser, he answers, that immediately after the sale he sent complainant the auctioneer's account of the sale, containing the names of the purchasers and the prices at which the bonds sold, which account the next year at Augusta complainant acknowledged he received.

The complainant in his bill sets forth certain statements as made to him by the respondent; "That the sale was bonafide after due and sufficient notice and advertisement thereof, that said bonds brought all they were fairly worth in the market; that the purchaser was a bonafide purchaser thereof, and also propounds to him interrogatory No. 5 on the same subject. The defendant was thus called upon not only to answer the specific interrogatory but also the allegations in the bill as to his statements and admissions made by him on this matter, and in reply thereto he states (on page 16 of the record), as is hereinbefore set forth, viz.: "That at Augusta in 1858 the complainant admitted he had received the account of sales sent him by defendant, and that defendant told him there was considerable due on the notes over and beyond the proceeds of said bonds, and that though he was not the owner of the bonds he could get them, and would do so, and give up all if he would pay;" but that complainant replied "that he did not

think the bonds worth so much as they sold for and that respondent must keep what he got, and if he ever got able he would pay the balance," and to the 5th specific interrogatory his reply is:

"He did after said sale send to the complainant the auctioneer's account of the sale, giving names of purchasers and prices for which the bonds sold, and afterwards, at the interview in Augusta, in 1858, he did state to the complainant, in substance, but not in the precise words, that he made the sale at auction after duly advertising the same, and that the sale was a good sale. He did not, to his recollection, use the words 'bona fide.' He then stated to the complainant the gross amount of the sale and that it had been applied on the notes."

The Court is of opinion that the answer is so far responsive to the charges and substance of the bill as to be evidence in behalf of the respondent, and to prove that the bonds were sold at public auction after due notice to complainant and advertisement in the public prints, and that soon after the sale the complainant had full information as to the prices realised and by whom the bonds were purchased. Is this evidence overcome by satisfactory evidence of the witnesses or of one corroborated by facts and circumstances which give it greater weight than the answer?

All the testimony in contradiction of the answer is found in the complainant's deposition, and in that he does state "that the first he knew of the bonds being bid in by defendant was in 1869, and that he had a conversation with him a few years before, and he then said, he had no interest in the bonds, and that it was a bonafide sale." But to the 7th cross interrogatory which is "State whether the defendant met you in the Court House in Augusta in 1858 and explained to you the sale of the bonds and the situation of the notes, and what you said to him, if anything?" His answer is, "I have some faint recollection of meeting him some time, but can't say when or where. The substance of the conversation I cannot recollect." This answer certainly does not afford much support to the statements found in his bill, which was sworn to by him March 9, 1869, and which purports to give with some detail the admissions made to him by the respondent. The complainant does not present himself as a witness in all respects worthy of entire reliance and confidence in the truth and accuracy of his statements. The averments made by him in his bill as to the motives and purpose of this pledge of these securities is most clearly shown by the receipt given at the

time to be erroneous, and that, on the contrary, the respondent's statement in his answer upon this point is true and correct, and it is equally manifest that the complainant must have been aware prior to 1869 that the bonds were bid in by respondent, as the bill was filed in March 1869, and the demand for an account was made by his attorney on the respondent on the 7th of the preceding January, while in his bill he states that he did not until lately come to a knowledge of these matters, and that within two years of the filing of the bill he had demanded an account of his trust from the respondent.

The evidence produced by the complainant is not sufficient, in the opinion of the Court, to overcome the effect of the answer according to the well-established rules in equity.

Two causes of action are set forth in the complainant's bill, one on account of the bonds, and the other on account of the notes, and although the bill charges that both bonds and notes were at the same time pledged to the respondent, it is quite certain that such was not the case. The memorandum given July 13, 1855, at the time the bonds were deposited with respondent, does not mention the notes, and the answer states that they were not received by respondent until the next year; "they were left with him for collection with authority to retain them as security for his claims on the complainant," and the bill charges that the complainant pointed out certain personal property of the corporation, which he directed to be attached, and if the notes were not thus paid to proceed against the stockholders on their personal liability, and that if the same are not collected it has been owing to the gross neglect and wilful default of said Whitmore. This abstract from the bill demonstrates that so far as any claim is made against the respondent on account of the notes, it is solely founded on his neglect of his duty as an Attorney at Law. There is no charge of any fraud in this respect, but the whole gravamen is neglect, and this portion of the bill is nothing more than inserting in a bill in equity a count in case for neglect of duty as an Attorney at Law in collection of demands entrusted to him for that purpose. A full and complete remedy at law exists and may be had by complainant, if the facts would sustain such a suit, and it is clear that this Court, as a Court of Equity, should not sanction such an attempt to confound the jurisdiction of the Courts.

It is equally clear on the evidence that the respondent has not been guilty of any negligence in this behalf. From his letter of March 20, 1856, to complainant, it appears "that

the officer would not attach the property unless he had a bond of indemnity," which security he had a right to require, and it was the complainant's duty to furnish, if he desired the attachment to be made. It is shown by the testimony of Mr. Bradbury "that the Coporation failed and became insolvent in the latter part of 1855, and has continued insolvent ever since, and that all its property, so far as he knew, was covered by mortgages, that he had many demands in his office for collection which he was unable to collect or secure, could discover no means of securing them, and that in a suit against the stockholders the Supreme Court of Maine held they were not liable." This decision was made in 1858 and was almost universally acquiesced in by the profession, hundreds of actions were decided in accordance with it, and it was not until December 1864 that the decision was reversed by the Supreme Court of the United States. An Attorney certainly cannot be chargeable with negligence when he accepts as a correct exposition of the law a solemn decision of the Supreme Court of the State.

The memorandum of July 13, 1855, shows that the bonds were deposited with Whitmore to secure to him the payment of complainant's notes and the note to Danforth, on which Whitmore was surety, and "the coupons of said bonds may be applied by Whitmore towards said notes." The notes were not paid at maturity, and payment was repeatedly demanded without avail until the bonds were sold at public auction after notice to the complainant. The full market value of the bonds was realised, but the respondent himself purchased $5000 of the amount at the sale and was recognized as the purchaser by the auctioneer, and $1500 were bid off by other parties from whom the defendant purchased them at the price they were sold for at auction. It does not appear that those parties at the sale acted in behalf of or by any understanding with Whitmore, although it may be inferred such was the case from their subsequent dealings with the bonds.

It is quite clear that a pawnee cannot become the purchaser of the property pledged even when sold at public auction. The law imposes upon him this restraint to insure good faith and fidelity on his part. This rule has been recognized both by American and Roman law.

Vide Story on Bailments, sec. 319.
25 Maryland Reports, 242 Md. Fire Ins. Co. vs. Dalrymple.
4 Met. 325, Middlesex Canal vs. Minot.

The sale therefore was tortious and invalid as against the complainant, and it depended on his election whether it should

become operative. It was voidable by him, but not absolutely void. The complainant was fully advised of the names of the purchasers and of the amount for which the bonds sold as early as July 1857. The bonds continued to depreciate in the market until the next year, when they would not have produced more than half the amount for which they had been sold. In 1863 the complainant himself sold some of the same class of bonds for 30 per cent. flat, and Mr. Bradbury states "he received some from him at that rate in payment of his account," and it was not until January 1869 that the complainant made any claim to the bonds, or that the respondent was in any way accountable to him for any breach of contract or misconduct in relation to them. The complainant, after full knowledge of all that had been done by respondent, acquiesced, and, by his silence, sanctioned and adopted the proceedings of the respondent for more than eleven years, during which time there had been great changes in the value of these securities, falling fifty per cent. below the amount for which he had been credited on his notes, and subsequently rising in value till they are said to be worth nearly their face. Will a Court of Equity sanction such silence and delay, and allow a party thus to reap so large a benefit from his remissness? The Court cannot but be of opinion that it was the duty of the party, when fully advised of what had been done, in some way within six years at least, to have communicated to the respondent his disaffirmance of his conduct and to have notified him that he should insist on his rights, and that after so long a time and such great changes in the value of the property, it is not consistent with the principles which guide Courts of Equity to permit him to repudiate the transaction at so late a day. If he could repudiate it after a sleep of eleven years, under full knowledge of the wrong inflicted upon him, there would seem to be no limit or restraint which could be imposed upon him or his representative in case of his decease. In Doggett vs. Emerson, 3 Story 740, Judge Story says, "Lapse of time in many cases is a most important consideration and weighs much, and sometimes *est maximi et momenti ponderis* especially when there has been a great change of circumstances as to the character and value of the property in the intermediate period, and *a fortiori* where the party complaining has been fairly put on his diligence, and has had complete means of inquiring as to all the material facts, and has chosen to lie by in gross indifference and indolence. See also *Hough vs. Richardson*, 3 Story, 699.

"There is a defence peculiar to Courts of Equity, founded

on lapse of time and the staleness of the claim, where no statute of limitations governs the case. In such cases Courts of Equity often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting the claim or long acquiescence in the assertion of adverse rights." 2 Story Eq., 889, and approved by Supreme Court of the United States, in Wagner vs. Baird, 7 Hav. 258, Badger vs. Badger, 2 Wal. 94, ibid 2 Cliff. 154. The statute of limitations is not pleaded in the case at bar, but laches is relied on and distinctly set forth as matter of defence in the answer, and in the opinion of the Court the complainant is clearly chargeable with such neglect of his rights as to bar him of all claim to redress, which otherwise he might have been entitled to.

The complainant avers that he did not, *until lately*, by reason of the fraudulent concealments of said Whitmore in the premises, come to a knowledge of the several matters and things hereinbefore alleged, but he does not state when or by what means the fraud was discovered. Such general and unsubstantial allegations of excuse cannot be regarded by a Court of Equity as sufficient. On the contrary, it is well settled that if the complainant would avoid the effect of lapse of time or the statute of limitations on the ground of concealed fraud, he must set forth with particularity when and by what means the fraud was discovered, and the averment so made must be supported by proof: per Clifford J., in Badger vs. Badger, citing numerous decisions of the Supreme Court of the United States in support of the principle. In New Albany vs. Burke, 11 Wal., 107, the same length of time had elapsed since the transaction had taken place, and the Court say, "No excuse is therefore shewn for the long delay, and it is difficult to see why they are not barred by the rule in Equity analagous to the statute of limitations."

At the hearing, objection was taken that Paine should have been joined as a party defendant. This objection, under the circumstances, does not appear to have been made seasonably, as the case was allowed to come to argument before it was presented. It was admitted that Paine was a citizen of Massachusetts at the time the Bill was filed, and it was shewn that he never actually received the bonds, or in any way took any control over the same. It did not appear that he had made any advances or incurred any liabilities on account of the bonds, or that he had any claim or right of any kind to the same, or had ever asserted such right, and that the bonds

were retained and held by the defendant, and by him disposed of, and that the proceeds had been by him applied toward the satisfaction of the liabilities of the complainant. If he had any reason to suppose that Paine had any interest to be affected by the decree, we think he should, in an earlier stage, have made known his claim and brought it to the knowledge of the Court. The bill asks for relief only against the proceedings and dealings of the respondent with the bonds, and makes no claim that Paine has in any way wronged or injured the complainant, and although Paine might properly have been made a party, we do not think that it was necessary that he should be a party in order to have done full justice between the complainant and respondent. If the case could have been sustained on its merits, the case of Story vs. Livingston, 13 Peters, 359, fully sustains this view of the objection.

See also 1 Dan., C. P. 285.

Bill dismissed with costs.